TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 332

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, ET AL., ETC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1936.

CERTIORARI GRANTED OCTOBER 19, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

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vs.

THE UNITED STATES OF AMERICA

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. Paul DuPont, William A. Fine, Arthur F. Shettle, William A. Whitaker, Co-partners, Trading under the Firm Name and Style of Francis I. DuPont & Company, Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA, Defendant-Appellee

STATEMENT UNDER RULE 234

This action was commenced on June 10, 1935, by the filing of a petition. The answer was served on August 30, 1935, and filed on August 31, 1935.

Plaintiffs moved to strike out defendant's answer and for summary judgment, and defendant made a cross-motion to strike out plaintiff's petition and for summary judgment, both motions having been heard on October 15, 1935, before Judge Henry W. Goddard and decided on December 31, 1935, in favor of defendant.

The order appealed from striking out plaintiffs' petition and awarding judgment for the defendant was made on January 6, 1936, entered on January 7, 1936, and the judgment appealed from was entered January 16, 1936.

[fol. 2] The appeal herein was taken on January 23, 1936.

The names of the original parties are above set forth and there has been no change of parties since the commencement of the action.

Plaintiffs appear by Irving Mariash. Defendant appeared by F. W. H. Adams, who was succeeded by Lamar Hardy, United States Attorney.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

COMPLAINT

To the Honorable Justices of the District Court of the United States for the Southern District of New York:

Plaintiffs herein, by their attorney, Irving Mariash, Esq., as and for their petition herein, respectfully show and allege:

[fol. 3] 1. That the United States of America is a corporation sovereign created under the Constitution of the United States.

2. That the plaintiffs are co-partners trading under the firm name and style of Francis I. DuPont & Company, and having their office in the Southern District of New York.

3. The plaintiffs are in the business of cotton brokers trading on and as members of the New York Cotton Exchange.

4. Plaintiffs were acting as agents and brokers for certain principals, which principals were the owners of future delivery cotton contracts for the total amount of 24,100 bales of cotton.

5. That shortly prior to March 23, 1934, plaintiffs received instructions from its principals requesting plaintiffs as their agent and broker to transfer said contracts to other brokers, Messrs. Fenner & Beane, for the account of the same principals, so that Messrs. Fenner & Beane would act as agent and broker in place of plaintiffs.

6. That in compliance with these instructions, plaintiffs took the necessary steps to terminate their agency for the said principals and to transfer the cotton accounts referred to, to Fenner & Beane, as the new substituted brokers for these principals.

7. That in accordance with the rules of the New York Cotton Exchange and the New York Cotton Exchange

Clearing Association, such transfer is accomplished by entering these accounts totalling 24,100 bales as transfers [fol. 4] on plaintiff's sales sheets of March 23 and the receiving brokers, Fenner & Beane, entering the same on their purchase sheets as of the same day.

8. That after such transfer the same owners continued to own these cotton contracts as prior to the transfer.

9. That under the rules of the New York Cotton Exchange Clearing Association and the regulations of the Internal Revenue Department, at the end of each month, brokers must file monthly recapitulation sheets of the transactions occurring during the previous month and must affix thereto the proper amounts of future delivery Federal revenue stamps.

10. That on or about April 4, 1934, plaintiffs purchased $1,984.10 of such future delivery stamps from the Empire Trust Company at 120 Broadway, New York City, a designated sales agent of the Internal Revenue Department, affixed them to said recapitulation sheet and cancelled same.

11. That plaintiffs' transactions during the prior month other than the one herein referred to totalled $1,254.70.

12. That plaintiffs affixed stamps and cancelled the same in connection with the foregoing transaction in the additional sum of $729.40.

13. That said affixation and cancellation of said $729.40 in stamps was done erroneously and unnecessarily and as a result of mistake.

[fol. 5] 14. That the foregoing transfer is a non-taxable transaction.

15. That thereafter these contracts were liquidated for the same principals by the new brokers, Fenner & Beane.

16. That at said time the full tax was paid through Fenner & Beane and the full proper amount of future-delivery stamps, purchased, affixed and cancelled.

17. That immediately thereafter, on April 5, 1934, plaintiffs filed a claim for refund with the Collector of Internal Revenue for the Second District of New York in due and proper form.

18. That on June 12, 1934, said claim was rejected by the Commissioner of Internal Revenue.

19. That the Commissioner of Internal Revenue in rejecting said claim ruled that: "Inasmuch as these accounts are transferred by passing sales for future delivery through the Clearing House under the rules and usages applicable thereto, such contracts are subject to the stamp tax."

20. That the rule and determination of the Commissioner of Internal Revenue is in error.

21. That the plaintiffs duly applied for reconsideration of said claim and rehearing, which application was denied.

22. That there is now due and owing to plaintiffs from defendant the sum of $729.40 with interest from April 5, 1934, which sum defendant has failed to pay though duly demanded.

[fol. 6] Wherefore, plaintiffs pray for judgment against the defendant in the sum of $729.40 with interests and costs.

Dated, New York, June 7, 1935.

Irving Mariash, Attorney for Plaintiffs, Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

(Verified by Francis I. DuPont, one of the partners in plaintiff firm, June 7, 1935.)

IN UNITED STATES DISTRICT COURT

ANSWER TO COMPLAINT

The defendant, by F. W. H. Adams, United States Attorney for the Southern District of New York, its attorney, for its answer to the complaint filed herein, respectfully shows the Court and alleges upon information and belief:

1. Admits the allegations in Paragraphs 1, 2, 3, 9, 18, 19 and 21 of the complaint.

2. Denies each and every allegation in Paragraph 4 of the complaint except the defendant admits that the plain-
[fol. 7] tiffs purchased 24,100 bales of cotton for future delivery for the account of certain of their customers.

3. Denies having any knowledge or information sufficient to form a belief as to each and every allegation in Paragraphs 5, 6, 8, 10, 11, 15 and 16 of the complaint, and therefore denies the same.

4. Denies each and every allegation in Paragraph 7 of the complaint except the defendant admits that on or about March 23, 1934, in accordance with the rules and usages of the New York Cotton Exchange, and the New York Cotton Exchange Clearing Association, plaintiffs undertook to and did sell and transfer the aforesaid 24,100 bales of cotton to Messrs. Fenner & Beane, brokers and members of the New York Cotton Exchange, and that said transaction was cleared through the New York Cotton Exchange Clearing Association in accordance with its by-laws, rules and usages, as a sale, and the plaintiffs and the said Fenner & Beane duly executed the usual form of sale and memorandum and recorded and reported the transaction as a sale, subject to payment of the documentary stamp tax under the provisions of Schedule A-4, Title VII of the Revenue Act of 1926.

5. Denies each and every allegation of Paragraph 12 of the complaint except the defendant admits that the plaintiffs paid the sum of $729.40 for the documentary stamp tax in connection with the aforesaid sale of said 24,100 bales of cotton for future delivery.

6. Denies each and every allegation in paragraphs 13, 14, 20 and 22 of the complaint.

[fol. 8] 7. Denies each and every allegation of Paragraph 17 of the complaint except the defendant admits that plaintiffs filed a claim for refund with the Collector of Internal Revenue for the Second District of New York on April 6, 1934.

Wherefore, defendant prays judgment against the plaintiffs dismissing the petition and for the costs and disbursements of this action.

F. W. H. Adams, United States Attorney for the Southern District of New York, Attorney for Defendant, U. S. Courts & P. O. Building, Borough of Manhattan, City of New York.

Duly sworn to by Elizabeth R. Horan. Jurat omitted in printing.

[fol. 9] IN UNITED STATES DISTRICT COURT

PLAINTIFFS' NOTICE OF MOTION FOR JUDGMENT

Please take notice that upon the annexed affidavits of Irving Mariash, Esq., duly verified September 27, 1935; John P. Collins, duly verified September 23, 1935; John P. Julian, duly verified September 23, 1935; and upon the petition herein, duly verified June 7, 1935; and the answer of the defendant, duly verified August 29, 1935, which are hereto annexed, a motion wil be made in the Motion Part of the United States District Court for the Southern District of New York, to be held in Room 235, United States Courts and Post Office Building, Borough of Manhattan, City of New York, on October 8, 1935, at 10:30 in the fore-[fol. 10] noon of that day, or as soon thereafter as counsel can be heard, for an order striking out said answer and directing that judgment for the amount demanded in the petition be entered in favor of the plaintiffs and against the defendant, together with the costs, disbursements and interest according to law, and for such other and further relief as may be just and proper.

Please take further notice that answering affidavits are required to be served at least five days before the return day of this motion.

Yours, etc., Irving Mariash, Attorney for Plaintiffs, Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

To F. W. H. Adams, Esq., United States Attorney for the Southern District of New York, Attorney for Defendant, U. S. Courts and P. O. Building, Borough of Manhattan, City of New York.

[fol. 11] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF IRVING MARIASH IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Irving Mariash, being duly sworn, deposes and says:

That he is the attorney for the plaintiffs in this action and fully familiar with the facts thereof. That plaintiffs

have fully and fairly stated to your deponent the facts constituting this cause of action and your deponent has advised them and verily believes that they have a good and meritorious cause of action and that there is no defense thereto. Your deponent has discussed this with counsel for defendant and believes that there is solely a question of law involved which must be resolved in the favor of the plaintiffs.

No previous application for the relief herein prayed for has been made.

Wherefore, your deponent prays that summary judgment be granted in favor of the plaintiffs and against the defendant in the sum of $729.40, together with the costs, disbursements and interest in this action.

Irving Mariash.

Sworn to before me this 27th day of September, 1935. Mitchell Antman, Notary Public. Kings Co. Cl'k No. 143, Reg. No. 6148. N. Y. Co. Cl'k No. 384, Reg. No. 6A208. Commission expires March 30, 1936.

[fol. 12] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN P. COLLINS IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

John P. Collins, being duly sworn, deposes and says:

That at all times hereinafter mentioned I was and still am the manager of the Commodity Department of Francis I. DuPont & Company and am thoroughly familiar with the transactions herein referred to.

On March 23, 1934, we, as brokers, were carrying approximately 24,100 bales of cotton for the following principals who were the owners thereof:

J. P. Abney, Grendel Mills #1, Panola Mills, J. Richard Abney, H. J. Thayer, O. C. Spivey, J. Wm. Watson, Farmers Loan & Tr. Co. and A. Sidney Hartzog, all of Greenwood, South Carolina.

On that day Mr. J. P. Abney, who was acting on behalf of these owners, notified us that he would take these ac-

counts out of our office and place them with Messrs. Fenner & Beane, another firm of brokers. In accordance with the owners' instructions, we were required to terminate our agency and transfer our said accounts to Fenner & Beane as the new substituted brokers. This we did. The cotton [fol. 13] was not sold and no commission was charged by us on the transfer. The same owners who owned the cotton prior to the transaction continued to own it thereafter. There was no change of ownership. There was no buyer involved.

As to the mechanics of making the transfer, we, being members of the New York Cotton Exchange, necessarily complied with that rule of the Cotton Exchange which requires that all transactions, of any kind whatsoever, be put through the Exchange. The Exchange will not recognize a contract for future cotton unless this is done. Furthermore, as a matter of practice, at the end of the month our stamp clerk affixes the appropriate number of stamps on all the transactions going through our office. Of course he has no knowledge that any one particular transaction is of a special nature and is not a usual sale. For that reason he affixed stamps to cover this transaction.

Your deponent avers of his own knowledge that no sale took place, that the transfer was recorded through the Cotton Exchange Clearing Association only because the rules of the Association require all transactions to be thus cleared, irrespective of whether they are bona fide sales or not. Your deponent has read the verified position herein and does of his own knowledge aver that he personally knows each and every allegation therein to be true and repeats and realleges the same as though fully set forth herein and the same are incorporated herein by reference.

John P. Collins.

Sworn to before me this 23 day of Sept., 1935. Lucille Oldacre, Notary Public, N. Y. Cty. Clerk's #31, Reg. #7-O-25. Commission expires Mar. 30, 1937.

[fol. 14] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JOHN L. JULIAN IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

John L. Julian, being duly sworn, deposes and says:

That I am a member of the firm of Fenner & Beane, members of the New York Stock Exchange and the New York Cotton Exchange. That on or about March 23, 1934, we took over by transfer certain accounts from Francis I. DuPont & Company listed in the annexed affidavit of John P. Collins.

In connection with the same there was no sale and the same owners who owned the accounts prior to the transfer continued to own them thereafter. There was merely a change in brokers. The only reason why the transactions were recorded on the purchase and sales sheets was that that is the only mechanics provided for by the New York Cotton Clearing Association for clearing transactions of this nature. There was, however, no sale of the cotton. Ultimately we did sell the cotton for the same principals and we paid the proper taxes and affixed the proper stamps in connection with the transactions.

John L. Julian.

Sworn to before me this 23rd day of Sept., 1935.
John G. Tarrant, Notary Public. N. Y. Co. Clk's #159, Reg. #7T198. Commission expires March March 30, 1937.

[fol. 15] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AFFIDAVIT OF JOHN P. COLLINS IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

John P. Collins, being duly sworn, deposes and says:

For the purpose of clarifying deponent's affidavit of September 23, 1935, deponent avers that the customers'

instructions to transfer these accounts to Messrs. Fenner & Beane followed our request to the customers to take these accounts out of our house and for that reason no commission was charged in accordance with Section 7 of the Commission Rules of the New York Cotton Exchange.

John P. Collins.

Sworn to before me this 11th day of October, 1935.
Lucille Oldacre, Notary Public, New York County.
Clerk's No. 81, Register's No. 7-O-25. Commission expires March 30, 1937. (Seal.)

[fol. 16] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FRED F. KUHLMANN IN SUPPORT OF PETITIONER'S MOTION

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Fred F. Kuhlmann, being duly sworn, deposes and says:

That he is the assistant secretary of the New York Cotton Exchange and is thoroughly familiar with the charter, by-laws and rules thereof and also the charter, by-laws and rules of the New York Cotton Exchange Clearing Association, Inc. Under commission rule number 7, when the transfer is made at the request of the house carrying the contracts, no commission or tax is to be charged to a customer for whom the contracts are carried. Although it appears from the signing of purchase and sale contract slips and the filing of the tax return sheets that an additional purchase and sale had been made, such is not the case. It is simply a transfer of outstanding contracts, from the carrying to the receiving broker, and the customer is not penalized by the payment of a commission or revenue tax. If an actual change of ownership took place, the house carrying the contracts would not be permitted to waive its commission. The inclusion of the transaction on the sales and purchase slips is merely for the purpose of preserving the regularity of our records. By the provisions of the by-laws of the New York Cotton Exchange and

[fol. 17] the New York Cotton Exchange Clearing Association, Inc., both the house carrying the contracts and the house receiving the outstanding contracts are required to sign the regular purchase and sales slips so that their respective positions with the Clearing House may be correctly stated as regards the transfer.

Fred F. Kuhlmann.

Sworn to before me this 11 day of October, 1935. Johanna M. Ronner, Notary Public, Kings Co. Kings Co. Clk's No. 410, Reg. No. 7083. N. Y. Co. Clk's No. 197, Reg. No. 7R117. Commission expires March 30, 1937. (Seal.)

In United States District Court

Affidavit of R. St. G. Walker in Support of Petitioner's Motion

State of New York,
County of New York, ss:

R. St. G. Walker, being duly sworn, deposes and says:

I have this day at the request of the Assistant United States Attorney made an affidavit regarding a certain transfer of future cotton contracts between Francis I. DuPont & Company and Fenner & Beane. I am at the same time making this affidavit so that my explanation of the transaction may be exactly clear and subject to no misinterpretation.

[fol. 18] While the transaction referred to was reported on "Sold by" and "Bought by" sheets, that by no means shows that it was necessarily a sale. Every transaction, whether a sale or not, between brokers must be reported on these sheets as they are the only forms we use. Every purchase and sale of cotton for future delivery is recorded on these forms. But, also, every transfer from broker to broker without involving a sale is recorded on the same forms. The names of customers are not reported to us and therefore we cannot tell whether a transaction is an

actual sale or merely a transfer of accounts from one broker to another.

R. St. G. Walker.

Sworn to before me this 10th day of October, 1935. William L. Brown, Notary Public. Queens Cty. Clk's. #176. N. Y. Co. Clerk's #370. Comm. expires Mch. 30, 1936.

[fol. 19] IN UNITED STATES DISTRICT COURT

DEFENDANT'S CROSS NOTICE OF MOTION TO DISMISS

SIRS:

Please take notice that upon the annexed affidavits of Elizabeth Rogers Horan, sworn to October 10, 1935, and R. St. G. Walker, sworn to October 9, 1935, and Fred F. Kuhlmann, sworn to October 10, 1935, and upon the summons and complaint herein, and the answer of the defendant, duly verified August 29, 1935, and upon all the proceedings had herein, a motion will be made in the Motion Part of the United States District Court for the Southern District of New York, to be held in Room 235, United States Courts & Post Office Building, Borough of Manhattan, City of New York, on the same day upon which the plaintiff's motion for a summary judgment, brought on by notice of motion served on defendant September 27, 1935, is to be heard, and at the same time, for an order dismissing the complaint and granting summary judgment in favor of the defendant and against the plaintiffs, and for such other and further relief as may be just and proper.

F. W. H. Adams, United States Attorney for the Southern District of New York.

To Irving Mariash, Esq., Attorney for Plaintiffs, 29 Broadway, N. Y. C.

[fol. 20] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ELIZABETH ROGERS HORAN IN OPPOSITION TO PETITIONERS' MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-NOTICE OF MOTION.

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

Elizabeth Rogers Horan, being duly sworn, deposes and says:

She is an Assistant United States Attorney for the Southern District of New York and as such is in charge of and familiar with the above entitled action.

The reason why this affidavit is made by deponent and not by the defendant is that defendant is a sovereign body politic.

In answer to the affidavits attached to the plaintiffs' notice of motion for summary judgment filed herein, and in opposition to the said motion, and, further, in support of defendant's motion for judgment, your deponent alleges upon information and belief as follows:

This action was commenced by the filing of a præcipe and the issuance of a summons and complaint on January 10, 1935; an answer was served by the defendant on August 30, 1935, within the time for such service, as extended, and filed August 31, 1935; and the plaintiffs have made a motion for summary judgment, setting forth certain facts by affidavits annexed to the notice of motion, and stating that [fol. 21] there is no question of fact involved, and that judgment should be granted in favor of the plaintiffs.

Your deponent believes that the only material question of fact in this case not admitted in the answer to the complaint, and not substantiated by the affidavits attached to plaintiff's motion for summary judgment, is the allegation in paragraph 7 of the complaint, which is denied in part in paragraph 4 of the answer, and stated by the defendant in said paragraph 4 of the answer to be as follows: "On or about March 23, 1934, in accordance with the rules and usages of the New York Cotton Exchange, and the New York Cotton Exchange Clearing Association, plaintiffs undertook to and did sell and transfer the aforesaid 24,100 bales of cotton to Messrs. Fenner & Beane, brokers and

members of the New York Cotton Exchange, and that said transaction was cleared through the New York Cotton Exchange, rules and usages, as a sale, and the plaintiffs and the said Fenner & Beane duly executed the usual form of sale and memorandum and recorded and reported the transaction as a sale, subject to payment of the documentary stamp tax under the provisions of Schedule A-4, Title VIII of the Revenue Act of 1926."

The said allegation in paragraph 4 of the answer is substantiated by the affidavit of R. St. G. Walker, annexed hereto, and by the Exhibits 1, 2, and 3 annexed to and made a part of said affidavit, and by the affidavit of Fred F. Kuhlmann, annexed hereto.

Your deponent believes that this action has no merit.

The sources of deponent's information and the grounds of her belief are documents and official communications [fol. 22] from the Attorney General of the United States, and the records and rules of the New York Cotton Exchange and the New York Cotton Exchange Clearing Association, which have been inspected by her.

Wherefore, your deponent respectfully prays that the complaint herein be dismissed, and judgment awarded to the defendant, and for such other and further relief as may be just and proper.

Elizabeth Rogers Horan.

Sworn to before me this 10th day of October, 1935.
Armand Chankalian, Notary Public, New York Co.
Clerk's No. 343, Reg. No. 7C494. Commission expires March 30, 1937.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. ST. G. WALKER IN OPPOSITION TO PETITIONERS' MOTION AND IN SUPPORT OF DEFENDANT'S MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

R. St. G. Walker, being duly sworn, deposes and says:

That he is Secretary and Treasurer of the New York Cotton Exchange Clearing Association, Inc., 60 Beaver Street, New York, N. Y.

That he has held such position since July, 1915, and is familiar with the rules and usages of the said Association. [fol. 23] That he is in charge of the records on file in the office of the said Association, and has examined said records and found among them the records of certain transactions made on March 23, 1934, between Francis I. DuPont & Co. and Fenner and Beane, hereinafter described, which records include data relating to the following contracts of cotton for future delivery:

Francis I. DuPont & Co.

Sold			Bought		
30	May	Contracts @ 1187			
15	July	" 1199			
119	Oct.	" 1211	1	Oct.	Contract @ 1211
76	Dec.	" 1221			
240	(Tax paid $729.40)				

That the said contracts for future delivery were recorded with the New York Cotton Exchange Clearing Association, Inc., on March 23, 1934, by Francis I. DuPont & Co. as having been "Sold by" Francis I. DuPont & Co. on that date to Fenner & Beane, on a form exactly like the blank form annexed hereto and made a part hereof and marked Exhibit 1.

That the said contracts for future delivery were likewise recorded with the said Association on March 23, 1934, by Fenner & Beane as having been "Bought by" Fenner and Beane from Francis I. DuPont & Co. on the said date on a form exactly like the blank form annexed hereto and made a part hereof and marked Exhibit 2.

That on April 4, 1934, the said Francis I. DuPont & Co. filed with the New York Cotton Exchange Clearing Association, Inc., a "Monthly Stamp Tax Memorandum," to which the requisite revenue stamps were affixed, which in- [fol. 24] cluded the transactions relating to the aforesaid contracts which were listed as having been sold by Francis I. DuPont & Co. to Fenner & Beane on March 23, 1934, on a form exactly like the form annexed hereto and made a part hereof and marked Exhibit 3.

That an oral request was made on March 23, 1934, to the Clearing Association by Francis I. DuPont & Co. to exempt

these entries from paying a tax on sales because it was stated by Francis I. DuPont & Co. that the transactions represented a change of brokers and not of principals, and no actual sale was then made, and that when an actual sale was made by the principal, the tax would be paid in due course by Fenner & Beane, the apparent buyer in this transaction.

As there was no precedent under the customary usages of the Clearing Association to comply with such a request, no written request to that effect was made by Francis I. DuPont & Co., and the oral request was not granted.

That under the usages of the New York Cotton Exchange Clearing Association, Inc., in March and April, 1934, and for many years prior thereto, every purchase and sale of cotton for future delivery from one member to another was recorded for clearance by the Association on forms like those annexed hereto, and marked Exhibits 1, 2 and 3.

R. St. G. Walker.

Sworn to before me this 9th day of October, 1935. August Wills, Notary Public, Queens County. Co. Clerk's No. 1769, Reg. No. 5088. Certificate filed in New York Co. Co. Clerk's No. 583, Reg. No. 7W97. Commission expires March 30, 1937. (Seal.)

[fol. 25] EXHIBIT 1 ANNEXED TO AFFIDAVIT OF R. ST. G. WALKER

New York, ... 19

Sold by .....

and contracts offered to New York Cotton Exchange Clearing Association, Inc. for clearance in accordance with its By-Laws and Rules.

To Whom Sold						
Number	No. Bales (00 omitted)	Month	Price	Settling Price	Debit Points	Credit Points
Totals						

Bale and Point Totals Forward

EXHIBIT 2 ANNEXED TO AFFIDAVIT OF R. ST. G. WALKER

New York, ... 19

Bought by .....

and contracts offered to New York Cotton Exchange Clearing Association, Inc. for clearance in accordance with its By-Laws and Rules.

From Whom Bought						
Number	No. Bales (00 omitted)	Month	Price	Settling Price	Debit Points	Credit Points
Totals						

Bale and Point Totals Forward

[fol. 26] EXHIBIT 3 ANNEXED TO AFFIDAVIT OF R. ST. G. WALKER

Monthly
Stamp Tax Memorandum

of .....

to the

New York Cotton Exchange Clearing Ass'n, Inc.

(Recapitulation of Daily Statements of Past Month)

New York, ... 193..

Day of Month	Total Value	Stamp Tax	Stamps
1 to 31			
Total			

Use Stamps of Large Denomination

To be filled in by the Clearing Association

Tax Checked by ..... Audited by .....
Footed ..... Stamps $ ..... By .....

[fol. 27] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF FRED F. KUHLMANN IN OPPOSITION TO PETITIONERS' MOTION AND IN SUPPORT OF DEFENDANT'S MOTION

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

I, Fred F. Kuhlmann, being duly sworn, depose and say:

I am Assistant Secretary of the New York Cotton Exchange, located at 60 Beaver Street, New York City.

I have held that position since about 1918, and am familiar with and have custody of the Charter, By-Laws and Rules of the New York Cotton Exchange.

The Commission Law Rules of the New York Cotton Exchange are made by the Committee on Commissions pursuant to its authority under Section 25 of the By-Laws, and are approved by the Board of Managers and have the same force and effect as By-Laws.

The following sections are sections of the said Charter, By-Laws and Rules of the New York Cotton Exchange, and were in full force and effect on March 23, 1934:

1. Section 33 of the By-Laws of the New York Cotton Exchange:

"Contract for Future Delivery

Sec. 33. No contract for the future delivery of cotton shall be recognized, acknowledged, or enforced by the Exchange, or any Committee or Officer thereof, unless both parties thereto shall be members of the New York Cotton Exchange, provided, however, that members shall offer their [fol. 28] contracts for clearance to the New York Cotton Exchange Clearing Association, Inc., which shall become by substitution a party thereto in place of a member, and thereupon such Association shall become subject to the obligations thereof and entitled to all the rights and privileges of a member in holding, fulfilling or disposing thereof.

All contracts for the future delivery of cotton shall be in the following form:

New York Cotton Exchange

Contract

New York ..... 1 ....

A. B. of the County and State of New York have this day sold/bought and agreed to deliver to/receive from C. D. of the same place, 50,000 pounds in about 100 square bales of Cotton, growth of the United States, at the price of ..... cents per pound for Middling, with additions or deductions for other grades in accordance with the provisions of the United States Cotton Futures Act, Section 6, and allowance for staple premium, deliverable from licensed warehouse in ..... between the first and last
(Point of Delivery)
delivery days of ..... inclusive, the delivery within such time to be at seller's option in one warehouse, upon notice to buyer, as provided by the By-Laws and Rules of the New York Cotton Exchange. The Cotton dealt with herein or delivered hereunder shall be of, or within, the grades for [fol. 29] which standards are established by the Secretary of Agriculture, except cotton prohibited from being delivered on a contract by the fifth sub-division of Section 5 of the United States Cotton Futures Act, and shall be of no other grade or grades, and shall be subject to New York Cotton Exchange inspection.

Either party may call for a margin, as the variations of the market or like deliveries may warrant, which margin shall be kept good.

This contract is made in view of, and in all respects subject to the regulations made pursuant to said United States Cotton Futures Act and to the By-Laws and Rules of the New York Cotton Exchange not in conflict with said Act or said regulations.

Subject to United States Cotton Futures Act, Section five.

Verbal contracts (which shall always be presumed to have been made in the foregoing form) shall have the same standing, force, and effect as written ones, if notice in writing of such contracts shall have been given by one of the parties thereto to the other party during the day on which such contract is made, or on the next business day thereafter.

Delivery of cotton on contract may be made at delivery points designated by the Board of Managers in addition to New York. The designated delivery points may be added to or subtracted from at the discretion of the Board of Managers after proper notice has been given to the membership."

[fol. 30] 2. Section 34 of the By-Laws of the New York Cotton Exchange:

"Contract Slips

Sec. 34. Each seller and buyer of cotton for future delivery shall on the day upon which the transaction takes place, sign a contract or slip therefor and deliver the same to the other party to the transaction.

All contracts or slips shall be signed by members themselves or by their firms, or by attorneys having requisite authority under these By-Laws.

A member or his firm may give power of attorney authorizing signature of his or the firm's name to contracts or slips, which power shall be duly executed in such form as may be prescribed by the Board of Managers, and shall be valid and binding upon said member or his firm until formally revoked.

All contracts or slips shall be signed with the full name of the member or his firm, and when signed by attorney, his name shall be written in full and as attorney.

All powers given shall be filed with and retained by the Secretary, and the person to whom the power is given shall attach his signature to it.

All powers given shall be announced from the rostrum by the Secretary at the close of the Exchange on the day the power is executed and posted on the bulletin for five days thereafter. The same procedure shall apply to the revocation of any power.

[fol. 31] All slips shall be in form as follows:

New York, ...

Sold to

.....

of New York, N. Y.

And agree to deliver to them subject to the By-Laws and Rules of New York Cotton Exchange and subject to United States Cotton Futures Act, Section Five.

Bales Cotton	Delivery	At Cents Per Pound For Middling

.....of New York, N. Y.

New York, ...

Bought of

.....

of New York, N. Y.

And agree to receive from them subject to the By-Laws and Rules of New York Cotton Exchange and subject to United States Cotton Futures Act, Section Five.

Bales Cotton	Delivery	At Cents Per Pound For Middling

.....of New York, N. Y.

[fol. 32] 3. Rule 27 of the New York Cotton Exchange:

"Revenue Stamps

Rule 27. Every member of the Exchange who shall make a contract of purchase or sale of cotton for future delivery

shall appoint, by proper power of attorney, The New York Cotton Exchange Clearing Association, Inc., his agent for the purpose of receiving and preserving for a period of four years the returns or memoranda described below.

As long as the Revenue Act of 1918 shall continue in force, it shall be the duty of every member of the Exchange who makes a contract of sale of cotton for future delivery, to deliver, within the time required by law, to said New York Cotton Exchange Clearing Association, Inc., such return or stamped memorandum thereof as may be required by law."

4. Section 7 of the Commission Law Rules of the New York Cotton Exchange:

"Transfer of Contracts

7. When a transfer of contracts already outstanding for the account of a customer is requested by the customer the full commission for both buying and selling must be charged, both by the house which originally purchased or sold the contracts, and the house to which the transfer is made. When the transfer is made at the request of the house carrying the contract or contracts the question of a commission involved shall be a matter of arrangement between the house making the request and the house assuming the con- [fol. 33] tracts, but in no event shall the customer be required to pay more than the regular rate of commission which would have been charged had no transfer been requested."

I am familiar with the following sections of the Charter, By-Laws, and Rules of the New York Cotton Exchange Clearing Association, Inc., and have copies of them in my possession, and know that they were in full force and effect on March 23, 1934:

1. Section 11 of the By-Laws of the New York Cotton Exchange Clearing Association, Inc.:

"Method of Clearance

Sec. 11. The Association may accept contracts offered to it by Clearing Members for clearance, and by such acceptance shall, in place of either party to a contract so accepted and toward the other party thereto, assume the obilgations

imposed thereby and succeed to and become vested with all the rights and benefits accruing therefrom, assuming to the buyer the position of seller and to the seller the position of buyer, as the case may be. As between the Association and each of the parties to an accepted contract, the terms and conditions thereof shall continue in full force and effect.

Each Clearing Member shall make daily reports to the Association of all contracts for future delivery of cotton made by such member on the New York Cotton Exchange with other Clearing Members in accordance with rules and regulations prescribed by the Directors.

Each report shall be accompanied by a check to the order of the Association, or draft upon it, for the amount neces- [fol. 34] sary, after allowing for amounts theretofore paid on account, to mark outstanding contracts with the Association, together with all other contracts set forth in the report to the last settlement prices posted by the Association, which shall be based on the closing bid prices on the New York Cotton Exchange for cotton deliverable in the months mentioned in such contracts, respectively. (Marking a contract to the last settlement price is the payment or receipt of the difference between the value of the contract at the contract price, and at the closing settlement price.) There shall also be attached to and be delivered with such report a check for any original margin that may be required, as prescribed in Sections 14 and 17. When trading in the current month has ceased, differences on outstanding contracts shall be settled as provided in Rule V.

All contracts reported to the Association as above provided shall be deemed accepted by it, unless the parties thereto are notified in writing to the contrary by the Association on or before 11 A. M. on the business day following that on which the contracts are made, up to which time the Association has the right to refuse to accept any contract reported to it as aforesaid."

2. Rule II of the New York Cotton Exchange Clearing Association, Inc.:

"II. No contracts shall be entered by members on their daily reports to the Association unless contracts or slips have been previously signed by both parties in accordance with the By-Laws of the New York Cotton Exchange."

[fol. 35] 3. Rule VII of the New York Cotton Exchange Clearing Association, Inc.:

"VII. On the last day upon which trading is permitted in cotton for delivery during any month, all transactions made in the current month shall be reported immediately by the seller to the Clearing Association, stating name of firm with whom the transaction is made."

Fred F. Kuhlmann.

Sworn to before me this 10 day of Oct., 1935. Johanna R. Ronner, Notary Public, Kings Co. Kings Co. Clk's No. 410, Reg. No. 7083. N. Y. Co. Clk's No. 197, Reg. No. 7R117. Commission expires Mar. 30, 1937. (Seal.)

In United States District Court, Southern District of New York

Irvin Mariash, Attorney for Plaintiffs, by Irving Mariash, I. Maurice Wormser, of Counsel.

F. W. H. Adams, United States Attorney, by Elizabeth Rogers Horan, Assistant United States Attorney.

Opinion

Goddard, District Judge:

The action is for refund of stamp tax in the sum of $729.40. The plaintiffs have moved for summary judgment [fol. 36] to recover the sum involved, and the defendant has moved for summary judgment dismissing the complaint.

The facts are undisputed. The plaintiffs are members of the New York Cotton Exchange. On March 23, 1934, they held for the account of a certain customer 24,100 bales of cotton for future delivery. They requested the customer to remove the account and were accordingly instructed by the customer to transfer the account to Fenner & Beane, also members of the Cotton Exchange. To effect the transfer, the plaintiffs made out a sales slip in the form regularly used by members, showing the sale to Fenner & Beane of the cotton, and Fenner & Beane gave a similar

purchase slip to the plaintiffs. Actually there was no sale, for the customer was the owner of the cotton before and after the transaction. There was merely a change of brokers, but under the usage of the Cotton Exchange all transfers from one member to another were evidenced by the exchange of sale slips and purchase slips as in this case. The plaintiffs paid the stamp tax through mistake, so they say, and sue to recover. The case then is one where a memorandum of sale of the cotton was made and delivered, as called for by custom of the Exchange but where in fact there was no sale.

I am of opinion that payment of the stamp tax was required in this case, and that no refund should be made.

The tax is imposed "for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this title, or for in respect of the vellum, parchment, or paper upon which [fol. 37] such instruments, matters, or things, or any of them, are printed or written." Revenue Act of 1926, §800, 26 U. S. C. A., §900. Under Schedule A, paragraph 4, the tax is "upon each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales), any products or merchandise at, or under the rules or usages of, any exchange, or board of trade, or other similar place, for future delivery * * *: Provided, that on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale."

In determining the liability to stamp duty, regard is paid to the form and face of an instrument, rather than to the transaction of which it forms a part. United States v. Isham, 17 Wall. 496; Merchants Warehouse Co. v. McClain, 112 Fed. 787, affirmed 115 Fed. 295. Here the sales slip on its face showed a sale in ordinary course under the rules of the Exchange, upon which the tax is levied. It does not matter that by looking at facts outside the instrument we may perceive that actually there was no sale, but simply a change of brokers.

The motion by the defendant for summary judgment dismissing the complaint will be granted, and the plaintiffs' motion denied.

December 31, 1935.

Henry W. Goddard, U. S. D. J.

[fol. 38] In United States District Court

Order Dismissing Complaint—January 6, 1936

The plaintiffs having made a motion upon the complaint and answer and the affidavits filed herein, and on all the proceedings had herein, for an order striking out the said answer and directing that judgment for the amount demanded in the complaint be entered in favor of the plaintiffs and against the defendant; and the defendant having made a cross-motion upon the complaint and answer and the affidavits filed herein, and upon all the proceedings had herein, for an order dismissing the complaint and granting summary judgment in favor of the defendant and against the plaintiffs, and the said motions having regularly come on to be heard on October 15, 1935, and the plaintiffs, by Irving Mariash, their counsel, having appeared in support of the plaintiffs' motion, in opposition to the defendant's motion; and the defendant, by F. W. H. Adams, then United States Attorney for the Southern District of New York, by Elizabeth Rogers Horan, Assistant United States Attorney, having appeared in support of the defendant's motion, and in opposition to the plaintiffs' motion; and the Court, by the Honorable Henry W. Goddard, United States Dis-
[fol. 39] trict Judge, having rendered a decision thereon on December 31, 1935, denying the motion of the plaintiffs and granting the motion of the defendant;

Now, upon reading and filing the said notices of motions, and upon all the proceedings had herein, and upon motion of Lamar Hardy, United States Attorney for the Southern District of New York, it is

Ordered that the plaintiffs' motion be and the same hereby is in all respects denied, and it is

Further Ordered that the defendant's motion be and the same hereby is in all respects granted, and it is

Further ordered that the Clerk of this Court enter judgment in favor of the defendant and against the plaintiffs dismissing the complaint, and it is

Further Ordered that the costs and disbursements of this action shall be awarded to the defendant.

Henry W. Goddard, U. S. D. J.

[fol. 40] In United States District Court, Southern District of New York

Judgment

The plaintiffs having moved for judgment, and the defendant having made a cross-motion for a judgment, and an order of this Court having been duly made denying the plaintiffs' motion and directing the entry of judgment as hereinafter provided, and the costs having been duly taxed in the sum of $20.00 by the Clerk of this Court,

Now, on motion of Lamar Hardy, United States Attorney for the Southern District of New York, attorney for the defendant, it is

Ordered and adjudged that the complaint filed herein is dismissed, and that the defendant recover of the plaintiffs thes um of $20.00 costs, and that the defendant have execution therefor.

Dated, New York, N. Y., this 16th day of January, 1936.

Charles Weiser, Clerk.

[fol. 41] In United States District Court

[Title omitted]

Notice of Appeal

Sir:

Please take notice that the plaintiffs, Francis I. DuPont, Edmund DuPont, Rhett DuPont, E. Paul DuPont, William A. Fine, Arthur F. Shettle, William A. Whitaker, co-partners, trading under the firm name and style of Francis I. DuPont & Company, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the

order entered herein on January 7, 1936, and from the judgment entered herein on January 16, 1936, dismissing plaintiffs' complaint with costs against plaintiffs in the sum of [fol. 42] $20.00; and from each and every part of said order and judgment, as well as from the whole thereof.

Dated New York, January 21, 1936.

Irving Mariash, Attorney for Plaintiffs, Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

To Lamar Hardy, Esq., United States Attorney, Southern District of New York, Attorney for Defendant, U. S. Courts & P. O. Building, New York City.

[fol. 43] IN UNITED STATES DISTRICT COURT

PETITION FOR LEAVE TO APPEAL

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Francis I. DuPont, Edmund DuPont, Rhett DuPont, E. Paul DuPoint, William A. Fine, Arthur F. Shettle, William A. Whitaker, co-partners, trading under the firm name and style of Francis I. DuPont & Company, plaintiffs herein, considering themselves aggrieved by certain errors which were committed in the proceedings heretofore had herein to the prejudice of said plaintiffs, as set forth in detail in the assignments of error which are filed with this petition, and by the order entered herein on January 7, 1936, and the judgment entered herein on January 16, 1936, dismissing plaintiffs' petition for a refund of taxes with costs against the plaintiffs, hereby pray that an appeal be allowed from said order and judgment and from each and every part thereof to the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of and for the reversal of said order and judgment, and that a transcript of the record, papers and proceedings in this case, duly authenticated by the Clerk of this Court, may be sent to the Circuit Court of Appeals and that a citation addressed to the defendant herein be issued as directed by law.

Dated, New York, January 21, 1936.

Francis I. DuPont, One of the Plaintiffs.

[fol. 44] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—January 22, 1936

On reading and filing the petition of the plaintiffs for allowance of an appeal herein and the notice of appeal and assignment of error, and on the motion of Irving Mariash, Esq., attorney for plaintiffs, it is

Ordered that said appeal be, and the same hereby is allowed; and it is further

Ordered that a citation addressed to the defendant herein be issued according to law; and it is further

Ordered that a transcript of the record, papers and proceedings herein, duly authenticated by the Clerk of this Court, be transmitted to the United States Circuit Court of Appeals for the Second Circuit.

Alfred C. Coxe, U. S. D. J.

[fol. 45] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS

Now come the plaintiffs, Francis I. DuPont, Edmund DuPont, E. Paul DuPont, William A. Fine, Arthur F. Shettle, William A. Whitaker, copartners, trading under the firm name and style of Francis I. DuPont & Company, by their attorney, Irving Mariash, Esq., and in connection with their petition for the allowance of the appeal herein, say that in the record of the proceedings and in the final judgment in the above entitled cause manifest errors were committed to the prejudice of the plaintiffs in that the District Judge erred:

1. In denying plaintiffs' motion for summary judgment for the amount demanded in the petition.

2. In granting defendant's motion for summary judgment dismissing the petition, with costs.

Wherefore, the plaintiffs pray that for the errors aforesaid the judgment and order of the United States District Court of the Southern District of New York be reversed.

Dated, New York, January 21, 1936.

Irving Mariash, Attorney for Plaintiffs, Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

[fol. 46] Citation, in usual form, omitted in printing.

[fol. 47] In United States District Court

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing printed transcript of record contains all of the proceedings herein as agreed upon between the parties hereto.

Dated, New York, February 17, 1936.

Irving Mariash, Attorney for Petitioners-Appellants.

Lamar Hardy, United States Attorney, Attorney for Defendant-Appellee.

[fol. 48] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 49] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1935

Argued April 22, 1936. Decided June 1, 1936

No. 356

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. Paul Dupont, William A. Fine, Arthur F. Shettle, and William A. Whitaker, Copartners, Trading under the Firm Name and Style of Francis I. Dupont & Company, Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Chase, Circuit Judges

Action against the United States to obtain refund of stamp taxes. From an order granting the defendant's motion for summary judgment, and from the judgment entered thereon, the plaintiff appeal. Affirmed.

Irving Mariash, of New York City (I. Maurice Wormser, of New York City, on the brief), for appellants.

Lamar Hardy, U. S. Atty., of New York City (Edward J. Ennis, Asst. U. S. Atty., and Helen E. Cottrell, Sp. Asst. U. S. Atty., both of New York City, of counsel), for the United States.

SWAN, Circuit Judge:

The plaintiffs are a firm of cotton brokers who trade on the New York Cotton Exchange. On behalf of certain customers they had purchased 24,000 bales of cotton for future delivery. On March 23, 1934, they were instructed by these customers to transfer their accounts to another firm of brokers. The plaintiffs carried out these instructions by delivering a "sold" memorandum to the other broker, who in turn delivered a "bought" memorandum to the plaintiffs. No commission was charged the plaintiffs' customers because their instructions to remove the accounts had been

given at the plaintiffs' request. The documents exchanged were in the form invariably used in every purchase and sale of cotton for future delivery between members of the Exchange. Upon this transaction the plaintiffs paid stamp taxes of $729.40, for which they immediately filed a claim for refund. The commissioner of Internal Revenue rejected it, and this action followed:

By the statute (Revenue Act 1926, § 800, Schedule A(4), 44 Stat. 99, 101, 102), a stamp tax is imposed upon "each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales) * * * at, or under the rules or usages of, any exchange * * * for future delivery." The plaintiffs contend: (1) That the statute contemplates a document evidencing a "real sale" and not a mere change of brokers for the same customer; and (2) that the transaction in question is expressly excepted as a "transferred or scratch sale." Rejecting these contentions, the District Court held the transaction taxable, and upon the pleadings and supporting affidavits gave summary judgment dismissing the complaint.

Although the purpose of the transaction was to transfer [fol. 50] a customer's account from one brokerage firm to another, the mechanics of doing this involved a contract of sale for future delivery made by the plaintiffs with the substitute broker. Ordinarily, it is true, one who acts as an agent does not become personally bound on a contract which he makes for a disclosed principal; but if he fails to divulge the name of his principal, he does become a party to the contract. American Law Inst. Restatement of Agency, §§ 320-322. When a broker deals in futures on the New York Cotton Exchange, he is personally liable as principal, whether or not he discloses the identity of his customer, for section 33 of the by-laws of the Exchange provides that no contract for future delivery shall be recognized or enforced by the Exchange "unless both parties thereto shall be members of the New York Cotton Exchange." It also specifies the form of contract to be used. This by-law is intended to, and does, force the brokers to assume the obligations of principals to each other. See Wilhite v. Houston, 200 F. 390, 392 (C. C. A. 8); Mullinix v. Hubbard, 6 F. (2d) 109, 110 (C. C. A. 8); American Cotton Mills v. Monier, 61 F. (2d) 852, 854 (C. C. A. 4). Nor is the broker's liability as a principal on his contracts

to buy or sell in any wise affected by his right to recover indemnity from his customer as in the cases last cited. See, also, Whitehead v. Izod, L. R. 2 C. P. 228; Ulster County Sav. Inst. v. Fourth Nat. Bank, 54 Hun. 638, 8 N. Y. S. 162, 165, 166. The contention that the broker has merely the status of a del credere agent is wholly groundless. Such an agent guarantees to the principal performance of the purchaser's contract. See American Law Inst. Restatement of Agency, § 424d. In case of a broker, the reverse is true; that is, the right of indemnity runs from the principal to the agent. If the facts at bar be analyzed with the foregoing principles in mind, it is apparent that what happened was this: The plaintiffs had incurred personal liability on contracts to purchase cotton to be delivered in the future; when instructed to "transfer" the accounts to another broker, they made a contract with the substituted broker to sell an equal amount of cotton to him. The result was not to release the plaintiffs from their original contracts to buy; no one could do that but the original sellers; and there was no novation, for the new broker assumed no contract relations with them. Hence the plaintiffs still remained obligated to receive delivery from the original sellers but had protected themselves in respect to this liability by obtaining the obligation of the substituted broker to receive delivery of a like amount of cotton from them. Protection of this character could be had only by making a sale to the new broker; it was obviously a sale in substance as well as in form. Statements to the contrary in the affidavits are merely expressions of opinion by the affiants and are erroneous conclusions of law. Arguendo the plaintiff's contention that the statute taxes only instruments evidencing an actual transaction may be admitted. But the result of reversal does not follow, for the plaintiffs' agreement to sell to the substituted broker was an actual transaction. To call it a transfer of the plaintiffs' contracts to buy is a misnomer resulting from an inaccurate analysis of the legal relations as above explained. No contract to buy was assigned; no title to specific cotton was transferred, and the new broker's contract did not require delivery by the plaintiffs of the same cotton they had contracted to accept from the original sellers, any other cotton of the specified description would satisfy the contract as well. The conclusion must be that the plaintiffs made an agreement to sell to the new

broker upon which they must pay a stamp tax unless it comes within the statutory exception of "so-called transferred or scratch sales."

This phrase has been defined in articles 44(a) and 125(3)(c) of Treasury Regulations 71. The definition requires that the purchase and sale be made at the same exchange, on the same day, at the same price, and for the account of the same person. The plaintiffs' sale to the substituted broker was made on March 23, 1934; the purchases for the plaintiffs' customers had been made prior to that date. Since the purchases and sales were not made on the same day, the transaction in question was not within the exception.

The judgment is affirmed.

[fol. 51] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House in the City of New York, on the 8th day of June, one thousand nine hundred and thirty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

FRANCIS I. DUPONT et al, as Co-Partners, etc., Plaintiffs-Appellants,

vs.

UNITED STATES, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 52] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Francis I. DuPont et al. vs. United States. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed June 8, 1936. William Parkin, Clerk.

[fol. 53] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered from 1 to 52, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Francis I. DuPont, et al., etc., Plaintiff-Appellants, against United States of America, Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 4th day of August, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk, by D. E. Roberts, Deputy Clerk.
(Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 19, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,872. U. S. Circuit Court of Appeals, Second Circuit. Term No. 332. Francis I. DuPont, Edmund DuPont, Rhett DuPoint, et al., etc., petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed September 1, 1936. Term No. 332, O. T. 1936.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 1 1936
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 332

FRANCIS I. DuPONT, EDMUND DuPONT, RHETT DuPONT, E. PAUL DuPONT, WILLIAM A. FINE, ARTHUR F. SHETTLE AND WILLIAM A. WHITAKER, CO-PARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF FRANCIS I. DuPONT & COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

IRVING MARIASH,
I. MAURICE WORMSER,
Counsel for Petitioners.

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Statute:

Revenue Act of 1926, Title 8, Section 800, Schedule A-4 [26 U. S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 332

FRANCIS I. DuPONT, EDMUND DuPONT, RHETT DuPONT, E. PAUL DuPONT, WILLIAM A. FINE, ARTHUR F. SHETTLE AND WILLIAM A. WHITAKER, CO-PARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF FRANCIS I. DuPONT & COMPANY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled case on June 8, 1936, affirming the judgment of the United States District Court for the Southern District of New York.

Opinions of the Courts Below.

The opinion of the District Court, though not reported, is in full in the Record (R. 35). The opinion of the Circuit Court (R. 49) is reported in 83 F. (2d) 951.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 53). The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Where a customer transfers his account from one broker to another, is the transfer taxed as a sale under Revenue Act of 1926, Title 8, Section 800, Schedule A-4 (26 U. S. C. A. 900, 903), merely because the parties used printed sheets designated "bought" and "sold"?

2. Does the exclusive fact that certain printed forms were used, alone determine the taxable status, without any relation whatsoever to the legislative intent to tax well-defined transactions (sales) through the instrumentality of documents used in carrying them out?

3. Which of the two diametrically contradictory constructions of the statute here involved is correct: *United States* v. *Uhlmann Grain Co.*, U. S. C. C. A., Seventh Circuit, June 18, 1936, holding no tax due, or the case at bar holding the tax to be due?

Statement of Facts.

The facts are undisputed, both petitioners and respondent relying on the affidavits of the same persons. They are correctly outlined in the opinion of the District Court (R. 35). They are not correctly set forth in the opinion of the Circuit Court, as shown hereafter. The review of the facts in the latter opinion is not supported by the record.

Petitioners are brokers on the New York Cotton Exchange. A customer, J. P. Abney, and his associates, purchased 24,100 bales of cotton futures contracts. He car-

ried them with petitioners' brokerage house, that is, he was "long" that number of bales. At the request of the brokers the customer transferred his account to another broker, Messrs. Fenner & Beane. *The contracts still remained in the name of the same customer and were still owned by the same customer before and after the transfer from the brokerage house of du Pont to the brokerage house of Fenner & Beane.*

The Cotton Exchange uses only one set of forms for convenience. Whether an actual sale takes place or whether there is merely a transfer of an account from one broker to another, the transaction is cleared by reporting it on "sold" sheets from du Pont and "bought" sheets from Fenner & Beane. These same documents, therefore, in some instances are evidence of a sale and in some instances are merely evidence of a transfer of brokers.

Although in fact there was no real sale involved, but merely the transfer of Abney's account from du Pont to Fenner & Beane, at the end of the month du Pont's stamp clerk erroneously and as a matter of routine affixed stamp taxes on the monthly reports to cover this transaction.

The good faith of the parties is conceded by the Government, and in fact a tax was ultimately paid when the cotton contracts were really sold by Abney. The denial of the refund results in two taxes having been paid, although the cotton was sold only once.

Specification of Errors.

The court below erred:

1. In holding that the transfer involved a contract of sale.

2. In holding that the petitioners were not released after the transfer and still remained obligated to receive delivery.

3. In rejecting the testimony of all of the witnesses as to the nature of the transaction as mere expressions of opinion.

4. In holding the transaction was not within the exception covering "transferred" sales.

5. In holding that the transaction was taxable.

6. In affirming the judgment of the District Court.

Reasons for Granting the Writ.

1. The opinion in this case has been sharply criticized by a later opinion in the Circuit Court of Appeals for the Seventh Circuit, *United States* v. *Uhlmann Grain Co.*, U. S. C. C. A., Seventh Circuit, June 18, 1936. That case exactly parallels the case at bar. Brokers on the Board of Trade in Chicago transferred accounts from one to another as did the brokers on the Cotton Exchange herein. As between the brokers, they understood that it was not a real sale, but simply a transfer of the accounts for purposes of their own. As far as the Board of Trade was involved, it was recorded as a sale, exactly as in the case at bar where the Cotton Exchange records apparently showed it to be a sale.

Likewise parallel, the transaction in that case did not go through the "pit" or floor of the exchange, but was done as a private office transaction. The reason for this was the same in both cases. If it went through the "pit" or floor, every other broker might have bid on it and the price would have been the current price on the floor. Since they merely intended to transfer the accounts, they did so, not at the current price, but at the same price at which it was carried on their books. In both cases, had there been a bona fide sale, the Board of Trade and Cotton Exchange regulations would have absolutely required it to go on the floor, but since it was not a bona fide sale, a private transaction was

proper. In both cases, the records of the brokers show the true nature of the transaction, although the records of the Clearing House and Board of Trade made it appear like a sale. The relationship of the parties, their respective rights and liabilities, and the usages of the Exchange were parallel.

The decision in the case at bar was before the court in the Seventh Circuit when it rendered its opinion and it frankly disagreed. The arguments raised by the Government counsel, though the same as in the case at bar, were rejected by that court. Likewise, the reasoning of the Circuit Court in the case at bar as to the assumption of liability by the brokers was held immaterial in that decision. The court candidly recognized that the transaction was not the usual sale, was not put through on the floor of the Exchange, was brought about by an office communication rather than a trade and that its correct nature was shown by the records of the brokers, although the official records of the Clearing House made it appear like a sale.

After reviewing the facts, the Court said:

> "There is a substantial difference between the records of an actual, completed sale which all parties agree is subject to the tax, and those of such a transaction as is here sought to be taxed, although both show up on the final records of the clearing house as sales. Appellant argues that because the transfer is recorded by the clearing house as a sale, with no indication on its records of its accommodation, character, and because the Board of Trade will recognize such transfer only on the basis of the assumption by the accommodation party of liability to fulfill the contract in case of default by the accommodated one, it must be considered a sale, agreement of sale or agreement to sell, subject to the tax. It apparently considers immaterial the fact that the transaction was brought about by the irregular method of an office or telephone communica-

tion, rather than in the pit. It argues that the government should be able to tax transactions according to the official records of the clearing house without having to refer to private agreements which negative their effect, or having to inspect subordinate records in order to determine how the transaction took place."

The Court then having its attention called to the decision in the case at bar commented upon it as follows, after brushing aside immaterial distinctions on the facts:

> "The decision of the New York case does not, however, rest on this distinction. Instead, the court there emphasizes the form of the transaction, 'Although the purpose of the transaction was to transfer a customer's account from one brokerage firm to another, the mechanics of doing this involved a contract of sale for future delivery made by the plaintiffs with the substitute broker. * * *' *The same might be said as to the transaction here involved, if we chose to be governed by the mechanics rather than the purpose of the transfers. We think, however, that the character of the transaction is not conclusively determined by the nature of the bookkeeping entry used in bringing it about. We agree with the finding of the District Court that the transactions herein described were not sales, agreements of sale, or agreements to sell, hence were not properly taxed as such.*"

We respectfully urge that the realistic approach of the Seventh Circuit Court with full recognition of the actual facts is much to be preferred to sustaining a tax upon a fiction conceived in inaccurate bookkeeping and given judicial recognition by refusing to see the true facts when they are undisputedly disclosed. Reasoning such as applied by the Court in the case at bar gives origin to the unhappy connotation attached to the words "legalistic reasoning." The tendency of modern judicial thought is not to unnecessarily differentiate the logic of the forum from the logic of the market place.

2. The Circuit Court opinion herein contradicts the reasoning of the District Court, *each affirming the judgment on inconsistent grounds.*

The District Court found that "actually there was no sale" and further found "It does not matter that by looking at facts outside the instrument we may perceive that actually there was no sale, but simply a change of brokers." The District Court based its opinion squarely upon the form of the instrument, frankly admitting that there was no sale.

The Circuit Court likewise supports the tax, although finding by strained reasoning that *there was a sale*, thus admitting by inference that no tax would levy unless there was a real sale. And the Circuit Court in the *Uhlmann* case clearly refutes the reasoning that a real sale resulted.

3. The decision is in conflict with the decisions in *Union Trust Co.* v. *Heiner*, 26 F. (2d) 391; *Dean* v. *Caldwell*, 9 F. Supp. 177; *Field Glore* v. *United States* (Standard Fed. Tax Service, Vol. 3-A, 1935, pp. 9803-9805); *A. B. Leach* v. *United States*, N. D. Ill., July 16, 1935; *National Bond & Share Corp.* v. *Hoey*, D. C., S. D. N. Y., October 29, 1935; and *United States* v. *Uhlmann*, U. S. C. C. A., Seventh Circuit, June 18, 1936.

The Circuit Court for the Second Circuit has expressly repudiated the *Union Trust* v. *Heiner* decision *in spite of its having been followed so often by other courts.* In *Founders* v. *Hoey*, U. S. C. C. A., Second Circuit, July 6, 1936, it said:

> "The decision (*Union Trust* v. *Heiner*) therefore proceeded on an indefensible theory."

The conflict between the Second and Seventh Circuits on this very important point of law, and the lack of harmony in the various District Courts require clarification by this Court. The latest Supreme Court decision is *United States*

v. *Isham*, 17 Wall. 496 (1873), 21 L. Ed. 728, 84 U. S. 496, decided over 60 years ago and prior to the origin of these conflicts.

4. The Court disregarded the well recognized maxim that doubts as to the propriety of the tax should be resolved in favor of the taxpayer. *United States* v. *Isham*, 17 Wall. 496 (1873), 21 L. Ed. 728, 84 U. S. 496, laid down the following as a cardinal principle:

> "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption."

The doubt on the construction of this taxing statute is so great that several District Court opinions conflict and the Court of Appeals in the Second and Seventh Circuits are in disagreement (see *United States* v. *Uhlmann*, *supra*). Such a genuine doubt in the minds of eminent jurists is alone sufficient to warrant a determination in favor of the taxpayer.

5. There was no "sale" when Abney's account was transferred from one broker to another. Though the Clearing House forms seemed to indicate a sale, an examination of the true transaction and the records thereof clearly shows there was no sale. The parallel analysis made in *United States* v. *Uhlmann*, *supra*, exactly fits the facts at bar. There was no transfer of title, there was no buyer and seller. Title always remained in Abney, both before and after the transfer. Furthermore had there been a real sale, it must necessarily have been conducted on the floor of the Exchange in accordance with its rules. This transaction never went through the floor or "pit," nor was the general membership of the Exchange permitted to bid on the transaction as would have been absolutely required had there been a real sale.

6. Where there is a real transaction contemplated by the taxing statute, form generally determines the documentary tax. But where there is no real taxable transaction, a form is a mere simulacrum. This is best expressed in *United States* v. *Uhlmann, supra.*

> "The same might be said as to the transaction here involved, if we chose to be governed by the mechanics rather than the purpose of the transfers. We think, however, that the character of the transaction is not conclusively determined by the nature of the book-keeping entry used in bringing it about. We agree with the finding of the District Court that the transactions herein described were not sales, agreements of sale, or agreements to sell, hence were not properly taxed as such."

In *Merchants Warehouse* v. *McClain,* 112 Fed. 787, aff'd 115 Fed. 295, the Court said:

> "I do not understand, however, from either of these cases, that the instrument is to be entirely divorced from the circumstances under which it is given; and indeed, I do not well see how it could be, since *we must to some extent, look to the connection, to know just what it is with which we are dealing.*"

In *National Bond & Share Corp.* v. *Hoey,* D. C., S. D. N. Y., October 29, 1935, Judge Julian W. Mack in the same District disagreed with, and declined to follow, a previous decision by Judge Goddard finding that form alone controls.

Other cases supporting our conclusions are: *Union Trust Co.* v. *Heiner,* 26 F. (2d) 391; *Dean* v. *Caldwell,* 9 F. Supp. 177; *Field Glore* v. *United States* (Standard Fed. Tax Service, Vol. 3-A, 1935, pp. 9803-9805); *A. B. Leach* v. *United States,* N. D. Ill., July 16, 1935.

Though there was no sale, a tax was levied because a form was used for the convenience of bookkeeping and rec-

ord. The form is the instrumentality through which a *real* sale is taxed. But the stamps are required only on documents used in connection with transactions contemplated by the taxing statute. Though a document be of a form customarily used in a taxable transaction, *if in truth it was erroneously or unwisely used in connection with a non-taxable transaction,* no tax is assessable. The document is only the means through which Congress reaches the real transaction. Where there is no taxable transaction the empty form ceases to be important.

7. The statute expressly exempts "transferred or scratch sales." The record describes a transferred sale as a transfer of a contract from broker to broker without commission being charged (R. 96, 52, 48). Treasury regulation 71, Articles 4A and 125 (3) (c) describe it as a purchase and sale at the same session of the Exchange, at the same price and on the same day for the account of the same person. Here the purchase and sale were made by Fenner & Beane and du Pont on the same Exchange, on the same day at the same price and for the account of the same customer, Abney.

The Court was unwarranted in rejecting the testimony of all the witnesses in this respect by merely calling them "opinions." The "opinions" of qualified experts must be relied upon by the Court where they are given honestly and in good faith, when the Court has no knowledge of its own on the subject.

8. Contrary to the facts and contrary to the record, the Circuit Court of Appeals found that the transaction did not release du Pont and that du Pont still remained obligated on the contracts transferred to Fenner & Beane. Nothing in the record supports this finding. The Circuit Court sweeps aside the statements in the record to the contrary

by saying that they are "merely expressions of opinion by the affiants." The affiants happen to be all and the only persons who know the true nature of the transaction. They include two experienced brokers and the Secretaries of the Exchange and of the Clearing House. Any one conversant with commodity exchanges knows that on a transfer of contracts, the first broker is completely out of the picture. The Court apparently was thinking of a "hedge," but a "hedge" is done on the open floor by *viva voce* bidding and all traders on the floor have an opportunity to bid on the purchase and sale. This transaction was a transfer which did not go on the open floor, was not a "hedge" and did not leave du Pont with remaining liability upon the contracts. It was the Circuit Court's complete misapprehension of this process that induced its conclusions.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the decree of the Circuit Court of Appeals for the Second Circuit in the above case, and that said decree be reversed.

IRVING MARIASH,
I. MAURICE WORMSER,
Attorneys for Petitioners.

(8147-C)

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To be argued by

IRVING MARIASH.

Supreme Court of the United States

OCTOBER TERM, 1936

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. PAUL DUPONT, WILLIAM A. FINE, ARTHUR F. SHETTLE and WILLIAM A. WHITAKER, co-partners, trading under the firm name and style of FRANCIS I. DUPONT & COMPANY, Plaintiffs-Appellants, against UNITED STATES OF AMERICA, Defendant-Respondent.	No. 332

BRIEF FOR PLAINTIFFS-APPELLANTS.

Appeal from a judgment of the Circuit Court of Appeals for the Second Circuit, affirming a judgment of the United States District Court, Southern District of New York, rendered by Judge Goddard. The action is for a refund of taxes. Cross-motions for summary judgment were decided in favor of the defendant, and the complaint was dismissed.

Opinions of the Courts Below.

The opinion of the District Court, though not reported, is in full in the record (R. 24). The opinion of the Circuit Court (R. 31) is reported at 83 F. (2d) 951.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 34). The petition for a writ of certiorari was granted October 19, 1936. The jurisdiction of this Court is invoked under the provisions of Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Where a customer transfers his account from one broker to another, is the transfer taxed as a "sale" under Revenue Act of 1926, Title 8, Section 800, Schedule A-4 (26 U. S. C. A. 900, 903), merely because the parties used printed sheets designated "bought" and "sold"?

2. Does the exclusive fact that certain printed forms were used, alone determine the taxable status, without any relation whatsoever to the legislative intent to tax well-defined transactions (sales) through the instrumentality of documents used in carrying them out?

3. Which of the two diametrically contradictory constructions of the statute here involved is correct: *United States v. Uhlmann Grain Co.*, 84 F. (2d) 901, holding no tax due, or the case at bar, holding the tax to be due?

Statement of Facts.

The facts are undisputed, both petitioners and respondent relying on the affidavits of the same persons. They are correctly outlined in the opinion of the District Court (R. 24). They are not correctly set forth in the opinion of the Circuit Court, as shown hereafter. The review of the facts in the latter opinion is not supported by the record.

Petitioners are brokers on the New York Cotton Exchange. A customer, J. P. Abney, and his associates, purchased 24,100 bales of cotton futures contracts. He carried them with petitioners' brokerage house, that is, he was "long" that number of bales. At the request of the brokers, the customer transferred his account to another broker, Messrs. Fenner & Beane (R. 9-10). *The contracts still remained in the name*

of the same customer and were still owned by the same customer before and after the transfer from the brokerage house of DuPont to the brokerage house of Fenner & Beane (R. 8-9).

The Cotton Exchange uses only one set of forms for convenience (R. 9-11). Whether an actual sale takes place or whether there is merely a transfer of an account from one broker to another, the transaction is cleared by reporting it on "sold" sheets from DuPont and "bought" sheets from *Fenner & Beane.* These same documents, therefore, in some instances are evidence of a sale and in some instances are merely evidence of a transfer of brokers (R. 11).

The Secretary of the Clearing Association testified: "While the transaction referred to was reported on 'Sold by' and 'Bought by' sheets, *that by no means shows that it was necessarily a sale.* Every transaction, whether a sale or not, between brokers must be reported on these sheets as they are the only forms we use. Every purchase and sale of cotton for future delivery is recorded on these forms. But, also, every transfer from broker to broker *without involving a sale* is recorded on the same forms" (R. 11). This was corroborated by all the witnesses (R. 7 to 11).

The Secretary of the Cotton Exchange testified: "Although it appears from the signing of purchase and sale contract slips and the filing of the tax return sheets that an additional purchase and sale had been made, such is not the case. It is simply a transfer of outstanding contracts, from the carrying to the receiving broker, and the customer is not penalized by the payment of a commission or revenue tax. *If an actual change of ownership took place, the house carrying the contracts would not be permitted to waive its commission.* The inclusion of the transaction on the sales and purchase slips is merely for the purpose of preserving the regularity of our records" (R. 10).

"Both the house carrying the contracts and the house receiving the outstanding contracts are required to sign the regular purchase and sales slips so that their respective positions with the Clearing House may be correctly stated as regards the transfer" (R. 11).

Although in fact there was no real sale involved, but merely the transfer of Abney's account from DuPont to Fenner & Beane, at the end of the month DuPont's stamp clerk, erroneously, and as a matter of routine, affixed stamp taxes on the monthly reports to cover this transaction.

The good faith of the parties is conceded by the Government, and in fact a tax was ultimately paid when the cotton contracts were really sold by Abney (R. 9). The denial of the refund results in two taxes having been paid, although the cotton was sold only once.

Specification of Errors.

The Court below erred:

1. In holding that the transfer involved a contract of sale.

2. In holding that the petitioners were not released after the transfer and still remained obligated to receive delivery.

3. In rejecting the testimony of all of the witnesses as to the nature of the transaction as mere expressions of opinion.

4. In holding the transaction was not within the exception covering "transferred" sales.

5. In holding the transaction was taxable.

6. In affirming the judgment of the District Court.

ARGUMENT.

POINT I.

The transaction was not a sale in fact or by any usage.

That there was *no real sale* is readily seen from the following: (a) no title passed, but at all times remained in the one owner, Abney; (b) no consideration or price was paid; (c) there was no buyer or seller, merely brokers for one principal.

That the transaction was not a sale under the usages of the Exchange is evidenced by: (a) the testimony of the Secretaries of both the Exchange (R. 10) and the Clearing Association (R. 11); (a) by the rule of the Exchange that no commission can be charged on a transfer, whereas commission *must* be charged on sales under the usages of the Exchange; (c) by the fact that the usages require a sale to go through the "pit" or floor of the Exchange with opportunity for every broker on the floor to bid on it, whereas this did not go through the floor but was accomplished by an exchange of memoranda between the two brokers to the exclusion of other member-brokers; (d) that, under the Exchange usages, the price must be the current quotation, whereas this was transferred at the original cost to Abney.

The only bearing or similarity that this transaction has to a sale is solely the use of "bought" and "sold" memoranda, *which all parties agree is a false and inaccurate description of the true nature of the deal. The very means of identification used by the Government are the very ones which everyone agrees are erroneous.*

As to the contention that DuPont was seller and Fenner & Beane buyer, the record discloses the true principal, and only by blinding ourselves to the true state of facts can the fiction be indulged.

Contrary to the facts and contrary to the record, the Circuit Court of Appeals found that the transaction did not release DuPont, and that DuPont still remained obligated on the contracts transferred to Fenner & Beane. Nothing in the record supports this erroneous finding. The Circuit Court sweeps aside the uncontradicted statements in the record to the contrary by saying arbitrarily that they are "merely expressions of opinion by the affiants" (R. 33). The affiants happen to be the *only* persons, and *all* the persons, who know the true nature of the transaction. They include two experienced brokers and both the secretaries of the Exchange and the Clearing Association. Anyone conversant with commodity exchanges knows that on a transfer of contracts, the first broker is completely out of the picture. The Court apparently was thinking of a "hedge," but a "hedge"

is done on the open floor by *viva voce* bidding and all traders on the floor have an opportunity to bid on the purchase and sale. This transaction was a transfer which did not go on the open floor, was not a "hedge" and did not leave DuPont with remaining liability upon the contracts. It was the Circuit Court's complete misapprehension of this simple business process that apparently induced its erroneous conclusions.

POINT II.

Erroneous and misleading bookkeeping forms do not determine the nature of a transaction for tax purposes.

A. THE REASONING OF THIS DECISION THAT FORM ALONE CONTROLS HAS BEEN SQUARELY REFUTED IN A LATER OPINION IN THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. *United States* v. *Uhlmann Grain Co.*, 84 F. (2d) 901, exactly parallels the case at bar. Brokers on the Board of Trade in Chicago transferred accounts from one to another, as did the brokers on the Cotton Exchange herein. As between the brokers, they understood that it was not a real sale, but simply a transfer of the accounts for purposes of their own. As far as the Board of Trade was involved, it was recorded as a sale, exactly as in the case at bar where the Cotton Exchange records apparently showed it to be a sale.

Likewise parallel, the transaction in that case did not go through the "pit" or floor of the Exchange, but was done as a private office transaction. The reason for this was the same in both cases. If it went through the "pit" or floor, every other broker might have bid on it and the price would have been the current price on the floor. Since they merely intended to transfer the accounts, they did so, not at the current price, but at the same price at which it was carried on their books. In both cases, had there been a *bona fide* sale, the Board of Trade and Cotton Exchange regulations would have absolutely required it to go on the floor, but since it was not a *bona fide* sale, a private transaction was

proper. In both cases, the records of the brokers show the true nature of the transaction, although the records of the Clearing Association and Board of Trade made it appear like a sale. The relationship of the parties, their respective rights and liabilities and the usages of the Exchange were parallel.

The decision in the case at bar was urged before the Court in the Seventh Circuit, but when it rendered its opinion the Court frankly disagreed with it. The arguments raised by the Government counsel, though the same as in the case at bar, were rejected by that Court. Likewise, the reasoning of the Circuit Court in the case at bar as to the assumption of liability by the brokers was held immaterial in that decision. The Court candidly recognized that the transaction was not the usual sale, was not put through on the floor of the Exchange, was brought about by an office communication rather than a trade, and that its correct nature was shown by the records of the brokers, although the official records of the Clearing Association made it appear like a sale.

After reviewing the facts the Court said:

> "There is a substantial difference between the records of an actual, completed sale which all parties agree is subject to the tax, and those of such a transaction as is here sought to be taxed, although both show up on the final records of the clearing house as sales. Appellant argues that because the transfer is recorded by the clearing house as a sale, with no indication on its records of its accommodation character, and because the Board of Trade will recognize such transfer only on the basis of the assumption by the accommodation party of liability to fulfill the contract in case of default by the accommodated one, it must be considered a sale, agreement of sale or agreement to sell, subject to the tax. It apparently considers immaterial the fact that the transaction was brought about by the irregular method of an office or telephone communication, rather than in the pit. It argues that the government should be able to tax transactions according to the official records of the clearing house without having to refer to private

> agreements which negative their effect, or having to inspect subordinate records in order to determine how the transaction took place."

The Court then having its attention called to the decision in the case at bar commented upon it as follows, after brushing aside immaterial distinctions on the facts:

> "The decision of the New York case does not, however, rest on this distinction. Instead, the court there emphasizes the form of the transaction, 'Although the purpose of the transaction was to transfer a customer's account from one brokerage firm to another, the mechanics of doing this involved a contract of sale for future delivery made by the plaintiffs with the substitute broker. * * *' *The same might be said as to the transaction here involved, if we chose to be governed by the mechanics rather than the purpose of the transfers. We think, however, that the character of the transaction is not conclusively determined by the nature of the bookkeeping entry used in bringing it about. We agree with the finding of the District Court that the transactions herein described were not sales, agreements of sale, or agreements to sell, hence were not properly taxed as such.*" (Italics ours.)

We respectfully urge that the realistic and practical approach of the Seventh Circuit Court, with full recognition of the actual facts, is much to be preferred to sustaining a tax upon a fiction, conceived in inaccurate bookkeeping, and given judicial recognition by refusing to see the true facts as they are undisputedly disclosed. Reasoning such as applied by the Court in the case at bar gives origin to the unhappy connotation attached to the words "legalistic reasoning." The tendency of modern judicial thought is not to unnecessarily differentiate the logic of the forum from the logic of the market place.

B. THE COURT DISREGARDED THE WELL-RECOGNIZED MAXIM THAT DOUBTS AS TO THE PROPRIETY OF THE TAX SHOULD BE RESOLVED IN FAVOR OF THE TAXPAYER. *United States* v. *Isham*,

17 Wall. 496 (1873), 21 L. Ed. 728, 84 U. S. 496, laid down the following cardinal principle:

> "If there is a doubt as to the liability of an instrument to taxation, the construction is in favor of the exemption."

The doubt on the construction of this taxing statute is so great that several District Court opinions conflict, and the Circuit Courts of Appeals in the Second and Seventh Circuits are in disagreement (see *United States* v. *Uhlmann*, *supra*).

The decision at bar is in conflict with *Union Trust Co.* v. *Heiner*, 26 F. (2d) 391; *Dean* v. *Caldwell*, 9 F. Supp. 177; *Field Glore* v. *United States*, (Standard Fed. Tax Service, Vol. 3-A, 1935, pp. 9803-9805); *A. B. Leach* v. *United States*, 84 F. (2d) 908; *National Bond & Share Corp.* v. *Hoey*, D. C., S. D. N. Y., November 6, 1935, and April 15, 1936; and *United States* v. *Uhlmann Grain Co.*, 84 F. (2d) 901.

The Circuit Court for the Second Circuit has expressly repudiated the Union Trust v. *Heiner decision in spite of its having been followed so often by other courts.* In *Founders* v. *Hoey*, U. S. C. C. A., Second Circuit, July 6, 1936, affirming Judge Goddard's opinion (September 10, 1935), it said:

> "The decision (*Union Trust* v. *Heiner*) therefore proceeded on an indefensible theory."

The Circuit Court opinion in this very case contradicts the reasoning of the District Court, each affirming the judgment on inconsistent grounds. The District Court found herein that "actually there was no sale" (R. 25) and further found "It does not matter that by looking at facts outside the instruments we may perceive that actually there was no sale, but simply a change of brokers" (R. 25). The District Court based its opinion squarely upon the form of the instrument, frankly admitting that there was no sale.

The Circuit Court, on the contrary, likewise supports the tax, although finding by strained and unsound reasoning that *there was a sale*, thus admitting by inference that no tax would levy unless there was a real sale. And the Circuit

Court in the *Uhlmann* case (*supra*) clearly refutes the reasoning that a real sale resulted.

Such a genuine doubt in the minds of eminent jurists is alone sufficient to warrant a determination in favor of the taxpayer.

C. WHERE THERE IS A REAL TRANSACTION SUCH AS IS CONTEMPLATED BY THE TAXING STATUTE, FORM GENERALLY DETERMINES THE DOCUMENTARY TAX. BUT WHERE THERE IS NO REAL TAXABLE TRANSACTION, A FORM IS A MERE SIMULACRUM. This is best expressed in *United States* v. *Uhlmann*, *supra:*

> "The same might be said as to the transaction here involved, *if we chose to be governed by the mechanics rather than the purpose of the transfers.* We think, however, that the character of the transaction is not conclusively determined by the nature of the book-keeping entry used in bringing it about. We agree with the finding of the District Court that the transactions herein described were not sales, agreements of sale, or agreements to sell, hence were not properly taxed as such." (Italics ours.)

In *Merchants Warehouse* v. *McClain*, 112 Fed. 787, aff'd 115 Fed. 295, the Court said:

> "I do not understand, however, from either of these cases that the instrument is to be entirely divorced from the circumstances under which it is given; and indeed, I do not well see how it could be, since *we must to some extent, look to the connection, to know just what it is with which we are dealing.*" (Italics ours.)

To the same effect, see *Union Trust Co.* v. *Heiner*, 26 F. (2d) 391; *Dean* v. *Caldwell*, 9 F. Supp. 177; *Field Glore* v. *United States* (Standard Fed. Tax Service, Vol. 3-A, 1935, pp. 9803-9805); *A. B. Leach* v. *United States*, 84 F. (2d) 908; *National Bond & Share Corp.* v. *Hoey*, D. C., S. D. N. Y., November 6, 1935, and April 15, 1936.

Union Trust Co. v. *Heiner* has been cited with approval in several decisions since.

In *National Bond & Share Corp.* v. *Hoey*, D. C., S. D. N. Y., Judges Julian W. Mack and Robert Patterson, in the same district, disagreed with, and declined to follow, a previous decision by Judge Goddard finding that form alone controls. The tax being construed was the same as in the case at bar, Revenue Act of 1926, Title 8. The facts are identical in that the National Bond & Share Corporation was the owner of securities which were transferred from its brokers to the Guaranty Trust Company, also acting as broker. There was no change of ownership. There was no sale. There was merely a transfer of brokers or agents. The Government, recognizing there was purely a question of law involved, tested it out on a motion to dismiss the complaint on the authority of Judge Goddard's District Court opinion in *Founders* v. *Hoey* (September 10, 1935). Judge Mack (November 6, 1935) declined to follow Judge Goddard and ruled in accordance with the five other Judges in the foregoing cases that there was proper ground for a tax refund. Subsequently Judge Patterson granted summary judgment in favor of the taxpayer (April 15, 1936). Judge Goddard apparently is the only Judge in the United States who has ever held that a transfer of brokers without a transfer of title is taxable under these schedules (*Founders* v. *Hoey*, *supra*, and the *case at bar*). He rests his opinions in each case upon a single isolated phrase picked out of the case of *United States* v. *Isham*, a decision sixty years old, decided prior to the origin of these conflicts. He disregards the two cardinal principles laid down in that decision to the effect that doubts should be resolved in favor of the taxpayer, and that the words of the statute are interpreted by the understanding of that public in which they are to take effect. He likewise overlooked or disregards the decisions of Judges Schoonmaker, Gore, Barnes, Holly and Mack, who all held that a transfer of brokers is not a taxable transaction contemplated by the statute.

Though there was no sale, a tax was levied because a form was used for the convenience of bookkeeping and record. The form is the instrumentality through which a *real* sale is taxed. Stamps are required only on documents used in

connection with transactions contemplated by the taxing statute. Though a document be of a form customarily used in a taxable transaction, *if, in truth, it was erroneously or unwisely used in connection with a non-taxable transaction,* no tax is assessable. The document is only the means through which Congress reaches the *real transaction.* Where there is no taxable transaction, the empty form ceases to be important.

POINT III.

A transferred sale is exempted by the statute.

The statute expressly exempts "transferred or scratch sales." The record describes a transferred sale as a transfer of a contract from broker to broker without commission being charged (R. 22). Treasury Regulation 71, Articles 4A and 125(3)(c), describe it as a purchase and sale at the same session of the Exchange, at the same price, and on the same day, for the account of the same person. Here the purchase and sale were made by Fenner & Beane and DuPont on the same Exchange, on the same day, at the same price, and for the account of the same customer, Abney.

The Court was unwarranted in rejecting the testimony of all the witnesses in this respect by merely calling them "opinions." The "opinions" of qualified experts must be relied upon by the Court where they are given honestly and in good faith, when the Court has no knowledge of its own on the subject.

It is a rule of construction that where technical words are used, the testimony of experts in that industry determines the meaning of the words. *United States* v. *Isham*, 17 Wall. 496, is authority for this point also:

> "The words of the statute are to be taken in the sense in which they will be understood by that *public in which they are to take effect.* Science and skill are not required in their interpretation, *except where scientific or technical terms are used.*"

The testimony in the record is uncontradicted—a transferred sale is described (R. 22) as a transfer from broker to broker for the account of the same customer without any transfer of title, and no commission can be charged where the transfer is requested by the broker, as in this case. The Cotton Exchange defines a transfer in its by-laws (R. 22): "* * * a transfer of contracts already outstanding for the account of a customer * * *." The secretary of the Clearing Association distinguished a transferred sale from a regular sale (R. 11). The secretary of the Cotton Exchange refers to it as:

> "Simply a transfer of outstanding contracts from the carrying to the receiving broker and the customer is not penalized by the payment of a commission or revenue tax. If an actual change of ownership took place, the house carrying the contracts would not be permitted to waive its commission" (R. 10).

We all are bound by this testimony. Who better knows the meaning of technical language in this business than the secretaries of the Exchange and of the Clearing Association, respectively occupying their positions over seventeen years, and thoroughly familiar with the language of the business, corroborated as they are by the language of the by-laws?

CONCLUSIONS.

The judgments should be reversed and judgment granted to the plaintiffs with costs and disbursements in all courts.

Respectfully submitted,

IRVING MARIASH,
I. MAURICE WORMSER,
Attorneys for Plaintiffs-Appellants.

Testimony of one Winston before the House of Representatives (referred to by Government counsel below) is not part of this record, was not subject to cross-examination in this case, is not binding on the parties hereto, *is incorrect*, and it is improper to refer to it.

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Supreme Court of the United States

OCTOBER TERM, 1936.

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. PAUL DUPONT, WILLIAM A. FINE, ARTHUR F. SHETTLE and WILLIAM A. WHITAKER, co-partners, trading under the firm name and style of FRANCIS I. DUPONT & COMPANY, Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA, Defendant-Respondent.

No. 332.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS.

This brief answers some of the points raised by the Government's brief regarding: (A) The nature of a transferred sale; (B) the nature of the transaction at bar, and (C) the law applicable.

A.

That the transfer was requested by the plaintiff, in the first instance, is *uncontradictedly shown* in Collins' affidavit (R. 10), and also by the fact that *no commission was charged* (R. 8). Under Exchange Rule 7 (R. 22) a commission otherwise must have been charged.

The Government argues (Br. 17) that this transaction is a sale *under the rules or usages* of the Exchange, because it is expressly provided for by Section 7 of the Rules of the

Exchange (R. 22). *The very section relied upon by the Government defines a "Transfer of Contracts," and not a sale.*

Treasury Regulation Article 125 (3) (c) defines a "pass-out" as only one type of transaction included within the generic term "transfer sale." Article 44 defines the conditions determining the entire generic exempt class of "transfer sales," i. e., "at the same Exchange, on the same day, at the same price, and for the account of the same person." This fits the present transaction perfectly. Winston's testimony before the House (Gov. Br. 14) defined "pass-outs" regulated by Article 125—only one type of "transfer sale" (surely there is at least as much merit in exempting Abney from the burden of *double* taxation as there is in exempting a scalper who admittedly makes two sales and purchases, offsets both, and pays no tax at all on two *bona fide* sales).

B.

The Government repudiates the reasoning of the District Court in this case (Br. 5, footnote) and of the Circuit Court of Appeals, Seventh Circuit, in the *Uhlmann* case (Br. 4, 18), and instead indulges in a tortuous rationalization of the transaction (Br. 7-13) based on erroneous premises unsupported by the record.

(1) The Government, going outside of the record, assumes what "took place" (Br. 9, 10, 11), indulging in a fiction supported neither by the record nor the facts. The Exchange *does not* deliver cotton, nor do we pay the Exchange on delivery. That is all done between the brokers. Furthermore, there are two forms of customers' confirmance notes. Some read "Sold to" the customer, establishing a sale relationship; others read "Sold for your account," establishing an agency relationship. We always used the latter form.

(2) DuPont did *not* sell 24,000 bales *to the Exchange* on March 23, 1934, and Fenner and Beane did *not* buy the same

quantity *from the Exchange* on the same day. They transferred between themselves by office memoranda, not by buying or selling on the floor of the Exchange, and at a price not then prevailing on the Exchange. The transfer price (original cost) varied from the current market price by $25,000.

(3) Under the *usages of the Exchange* what was done was not a "sale," but, under those very usages, it was a "transfer of contracts" under Rule 7 (R. 22).

(4) We do not argue that the transaction was "a mere formality," as the Government states (Br. 11). It was a *bona fide* "transfer of contract."

(5) The footnote on Government Brief (p. 11) is an error. No commission could be charged, and no commission was charged. See Exchange Rule 7 (R. 22) and affidavit of Kohlmann (R. 10).

(6) The Clearing House position with reference to the parties could be, and in fact was, adjusted without the tortuous sales scheme suggested by the Government (Br. 12) and *the statute itself provides exemption from taxation* (see Government Br. 12, footnote 10) "provided that such transfer shall not vest any beneficial interest in such clearing house association but shall be made for the sole purpose of enabling such clearing house association to adjust and balance the accounts of the members of such clearing house association on their several contracts."

C.

The argument *re* administrative interpretation for twenty-six years might perhaps be valid if applicable. *But this type of transaction has never before come up for administrative (or judicial) interpretation.* The absence from the Government brief of citations of administrative rulings thereon is significant proof that the question is *sui generis.*

Provost v. *United States*, 269 U. S. 443, bears no analogy to this case. Loans and returns for short sale deliveries are not simultaneous, are not transfers of existing contracts, and do not involve one and only one principal. Furthermore, that decision was based solely upon the precise wording of the statute involved (War Revenue Acts of 1917 and 1918). The Court distinguished it from other apparently similar acts (at p. 457):

> "Neither of these acts contains the words 'or transfers of legal title to shares or certificates,' which, we have indicated, are of significance in the Acts of 1917 and 1918 because precisely applicable to the transfers under consideration."

Respectfully submitted,

IRVING MARIASH,
I. MAURICE WORMSER,
Attorneys for Plaintiffs-Appellants.

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95507—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 332

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. PAUL DUPONT, WILLIAM A. FINE, ARTHUR F. SHETTLE AND WILLIAM A. WHITAKER, CO-PARTNERS, TRADING UNDER THE FIRM NAME AND STYLE OF FRANCIS I. DUPONT & COMPANY, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 35–37) is not officially reported. The opinion of the Circuit Court of Appeals (R. 49–52) is reported in 83 F. (2d) 951 (C. C. A. 2d).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 52). The petition for certiorari was filed on September 1, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a transaction between two members of the New York Cotton Exchange constitues a sale, agreement of sale, or an agreement to sell at, or under the rules or usages of, the Exchange, within the meaning of Section 800, Schedule A–4 of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 9–14.

STATEMENT

Petitioners are cotton brokers and members of the New York Cotton Exchange. Prior to March 23, 1924 (R. 3) they had purchased 24,100 bales of cotton for future delivery on behalf of certain customers. Shortly prior to March 23, 1934, said customers requested petitioners to transfer their accounts to Messrs. Fenner & Beane, also members of said Exchange (R. 3, 12).

On March 23, 1934, petitioners carried out said instructions by delivering a "sold" memorandum to Fenner & Beane, who in turn delivered a "bought" memorandum to petitioners. No commission was charged, although Section 7 of the

Commission Law Rules of the New York Cotton Exchange (R. 32) required that full commission be charged for both buying and selling where contracts are transferred at the customer's request. The opinion of the District Court departed from the allegations of Paragraph 5 of the sworn complaint (R. 3) wherein it is alleged that petitioners were instructed by their customers to transfer the contracts. The affidavit of John P. Collins (R. 12) likewise states that the transfer was pursuant to the customers' instructions. A subsequent affidavit by Collins (R. 15) attempts to qualify his earlier affidavit and to contradict Paragraph 5 of the complaint. Under Section 33 of the by-laws of the Cotton Exchange (R. 27) all contracts for the future delivery of cotton are required to be cleared through the New York Cotton Exchange Clearing Association and the transaction in question was so cleared (R. 13). There are no other mechanics provided for clearing such transactions, including the so-called "transfer of accounts" (R. 14). Under the usages of the Clearing Association, according to the affidavit of its secretary and treasurer, every purchase and sale of cotton for future delivery from one member to another had to be recorded for clearance by the Association on forms like "Exhibits 1, 2 and 3" (R. 24), as were executed by petitioners and Fenner & Beane.

Stamp taxes of $729.40 were paid by petitioners on said transaction which was listed as a sale on a monthly stamp-tax memorandum to which said

stamps were affixed. (R. 23.) A claim for refund was filed and after rejection suit was brought in the District Court which rendered judgment for the United States upon petitioners' motions to strike respondent's answer and for summary judgment, and similar cross-motions by respondent. (R. 1.) The Circuit Court of Appeals affirmed said judgment. (R. 52.)

ARGUMENT

The tax has not been imposed upon a transfer by a customer, but upon a transaction between petitioners and Fenner & Beane. The desire of the customer to transfer his account from one broker to another was merely the underlying incident which gave rise to the transaction taxable under Section 800 and Schedule A–4 of the Revenue Act of 1926. The first question presented by the petition is not here.

Petitioners, in substance, contend:

(1) That the statute contemplates a document or memorandum evidencing a "bona fide" sale and not a sale effected to result in a change in brokers, and—

(2) That the transaction in question is expressly excepted as a "transferred or scratch sale." These contentions were rejected by the court and judgment entered dismissing the complaint upon the pleadings and supporting affidavits.

Section 33 of the by-laws of the Exchange provided that no contract for future delivery shall be recognized or enforced by the Exchange, "unless

both parties thereto shall be members of the New York Cotton Exchange."

Petitioners incurred personal liability on contracts to purchase cotton to be delivered in the future; when instructed to "transfer" the accounts to Fenner & Beane, they executed, passed and recorded the usual "bought" and "sold" memoranda and protected themselves with respect to their said personal liability by obtaining the obligation of Fenner & Beane to receive delivery of a like amount of cotton from petitioners.

The court below held the transaction was a sale in substance as well as form (R. 51); and petitioners' contention that the tax has been imposed merely because certain printed forms were used is groundless.

However, whether the transaction be treated as a sale in substance or only as assuming the form of a sale under the rules and usages of the Exchange, the stamp tax liability under Section 800, Schedule A–4, *supra,* clearly attaches and the burden rests with the taxpayer to bring himself within one of the excepted classes under the Act.

Transactions excepted from the tax are "so-called transferred or scratch sales" and those where "sellers of commodities * * * having paid the tax * * * transfer such contracts to a clearing-house corporation or association." Such transfers "shall not be deemed to be a sale, or agreement of sale, or an agreement to sell within the * * * Act, provided that such transfer shall not vest any beneficial interest in such clearing-house associa-

tion, but shall be made for the sole purpose of enabling such clearing-house association to adjust and balance the accounts *of the members* of such clearing-house association on their several contracts" (italics supplied). The latter exception enables the clearing-house to settle and clear the accounts of brokers at the end of each day without the transaction being subjected to tax.

Petitioners' transaction does not fall within either exception. The "transferred or scratch sale", as defined in Articles 44 (a) and 125 (3) (c) of Treasury Regulations 71,[1] requires that the purchase and sale be made at the same exchange, on the same day, at the same price, and for the account of the same person. Petitioners' sale to Fenner & Beane was made on March 23, 1934, whereas the purchases for petitioners' customers were made prior thereto. Since the purchases and sales were not made on the same day, the transaction was not within said exception. The court below so held. (R. 52.)

Petitioners rely chiefly upon an alleged conflict with *United States* v. *Uhlmann Grain Co.* (C. C. A. 7th), decided June 18, 1936, not yet officially reported, but found in Prentice-Hall, 1936, Vol. 1, Par. 1323. A careful analysis, however, of the two cases discloses that there is no real conflict. The

[1] Said Treasury Regulations are in accord with the testimony of James H. Winston, lawyer, representing dealers of the Chicago Board of Trade, reported in Vol. II of the hearings of the House of Representatives on the Revenue Act of 1918, Miscellaneous Taxes, at page 1212, et seq.

only similarity is that the same taxing section was involved and substantially the same contention asserted by the Government. The question in the *Uhlmann* case was whether certain transactions known in the parlance of the Board of Trade as "accommodation trades" or "position loans" devised by traders to reduce their daily marginal requirements and entered into with the knowledge and approval of the Board of Trade were taxable as sales, agreements of sale or agreements to sell. Each "accommodation trade" was reported by both parties as an "accommodation trade" to the Grain Futures Administration of the Department of Agriculture in the daily reports required to be made to that Department. The transaction was held not taxable. The court there held that such trades are distinguishable from the transaction involved in the instant case, on the ground that in that case "there was no intention on the part of either party that the second should have anything to perform", whereas in the present case both parties intend "that the second should perform the contract"—in other words, an incomplete transaction in one case and a complete transaction in the other.

It follows, therefore, that on the authority of the *Uhlmann* decision itself there is no conflict with the instant case. Here, the second broker, Fenner & Beane, intended to perform by accepting delivery of the cotton, whereas in the *Uhlmann* case it was never intended by either party that the second, or accommodating broker, should perform by accept-

ing delivery. The first broker was still to accept delivery.

But, even were a conflict to exist, the more important fact is that the question involved in the *Uhlmann* case is now moot and no longer of general importance. Under Section 4c of the Commodity Exchange Act of June 15, 1936 (Public, No. 675, 74th Cong., 2d Sess.), "accommodation trades" and "fictitous sales" are prohibited and therefore a situation similar to that in the *Uhlmann case* cannot now be repeated.

Union Trust Co. v. *Heiner,* 26 F. (2d) 391 (W. D. Pa.), and the other District Court cases referred to (p. 7) are decidedly different in their fact situations and arise under a different section of the documentary stamp Act. Moreover, a divergence of view between District Courts and a Circuit Court of Appeals does not justify certiorari under the rules of this Court.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition should, therefore, be denied.

Respectfully submitted.

STANLEY REED,
Solicitor General.
ROBERT H. JACKSON,
Assistant Attorney General.
J. LOUIS MONARCH,
GEORGE H. ZEUTZIUS,
Special Assistants to the Attorney General.

SEPTEMBER 1936.

APPENDIX

Revenue Act of 1926, 44 Stat. 9:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

SCHEDULE A.—STAMP TAXES

* * * * *

4. Produce, sales of, on exchange: Upon each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales), any products or merchandise at, or under the rules or usages of, any exchange, or board of trade, or other similar place, for future delivery, for each $100 in value of the merchandise covered by said sale or agreement of sale or agreement to

sell, 1 cent, and for each additional $100 or fractional part thereof in excess of $100, 1 cent: *Provided,* That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale: *Provided further,* That sellers of commodities described herein, having paid the tax provided by this subdivision, may transfer such contracts to a clearing-house corporation or association, and such transfer shall not be deemed to be a sale, or agreement of sale, or an agreement to sell within the provisions of this Act, provided that such transfer shall not vest any beneficial interest in such clearing-house association but shall be made for the sole purpose of enabling such clearing-house association to adjust and balance the accounts of the members of such clearing-house association on their several contracts. Every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale or agreement of sale, or agreement to sell, or who, in pursuance of any such sale, agreement of sale, or agreement to sell, delivers any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who delivers such bill, memorandum, or other evidence of sale, or agreement to sell, without having

the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000 or be imprisoned not more than six months, or both.

No bill, memorandum, agreement, or other evidence of such sale, or agreement of sale, or agreement to sell, in case of cash sales of products or merchandise for immediate or prompt delivery which in good faith are actually intended to be delivered shall be subject to this tax.

This subdivision shall not affect but shall be in addition to the provisions of the "United States cotton futures Act," approved August 11, 1916, as amended, and "The Future Trading Act," approved August 24, 1921.

Treasury Regulations 71:

ART. 44. *Transactions not subject to tax.*—(a) So-called "transfer or scratch sales" or "pass-outs" are not subject to the tax: *Provided,* That the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person.

* * * * *

ART. 125.

* * * * *

(3) As used in Chapter IV of these regulations—

* * * * *

(c) The term "transferred or scratch sale" includes "pass-outs" or those transactions in which a person buys from another a certain quantity of any product at a certain price, and at the same session of an exchange, sells to a third person the same

quantity of the same product at the same price, and eliminates himself by instructing the person from whom he bought to deliver such product to the person to whom he sold; but no transaction in which a broker or a commission member of an exchange receives a commission greater than that charged to a person who executes his own contracts shall be deemed to be a "transfer" or a "scratch sale";

* * * * *

(Public, No. 675—74th Congress, 2d Sess.)

[H. R. 6772]

An Act to amend the Grain Futures Act to prevent and remove obstructions and burdens upon interstate commerce in grains and other commodities by regulating transactions therein on commodity futures exchanges, to limit or abolish short selling, to curb manipulation, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of the Grain Futures Act (U. S. C., 1934 ed., title 7, sec. 1) is amended to read as follows: "That this Act may be cited as the 'Commodity Exchange Act.' "

SEC. 2. The Grain Futures Act (U. S. C., 1934 ed., title 7, secs. 1 to 17, inclusive) is amended by striking out the word "grain" wherever it appears in such Act and inserting in lieu thereof "commodity", "any commodity", or "commodities", as the case may require, and by striking out the phrase "cash grain" wherever such phrase appears and inserting in lieu thereof "any cash commodity."

SEC. 3. Section 2 of the Grain Futures Act (U. S. C., 1934 ed., title 7, secs. 2, 3 and 4) is amended by—

(a) striking out the third sentence of paragraph (a) and inserting in lieu thereof the following: "The word 'commodity' shall mean wheat, cotton, rice, corn, oats, barley, rye, flaxseed, grain sorghums, mill feeds, butter, eggs and tuberosum (Irish potatoes)"; and

* * * * *

SEC. 5. The Grain Futures Act is amended by adding after section 4 (U. S. C., 1934 ed., title 7, sec. 6) the following new sections:

* * * * *

SEC. 4c. It shall be unlawful for any person to offer to enter into, enter into, or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) if such transaction is, is of the character of, or is commonoly known to the trade as, a "wash sale", "cross trade", or "accommodation trade", or is a fictitious sale;

(B) if such transaction is, is of the character of, or is commonly known to the trade as, a "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty", or

(C) if such transaction is used to cause any price to be reported, registered, or

recorded which is not a true and bona fide price.

Nothing in this section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall not have been disapproved by the Secretary of Agriculture. Nothing in this section or section 4b shall be construed to impair any State law applicable to any transaction enumerated or described in such sections.

* * * * *

Approved, June 15, 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1936

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 332

FRANCIS I. DUPONT, EDMUND DUPONT, RHETT DUPONT, E. PAUL DUPONT, WILLIAM A. FINE, ARTHUR F. SHETTLE AND WILLIAM A. WHITAKER, CO-PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF FRANCIS I. DUPONT & COMPANY, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 24–26) is not officially reported. The opinion of the Circuit Court of Appeals (R. 31–34) is reported in 83 F. (2d) 951.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 8, 1936 (R. 34). The petition

for a writ of certiorari was filed September 1, 1936, and was granted October 19, 1936 (R. 35). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether this transaction between two members of the New York Cotton Exchange constitutes a "sale, agreement of sale, or agreement to sell * * * at, or under the rules or usages of" the Exchange within the meaning of Section 800, Schedule A–4, of the Revenue Act of 1926.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in the Appendix, *infra*, pp. 24–27.

STATEMENT

Petitioners are cotton brokers and members of the New York Cotton Exchange. Prior to March 23, 1934, they were carrying future delivery contracts for 24,100 bales of cotton for the account of one Abney and his associates. On March 23, 1934, Abney requested [1] that the account be transferred to Messrs. Fenner & Beane, who also were cotton brokers and members of the Exchange. (R. 2, 7–8.)

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[1] The complaint alleges (R. 2) and the first affidavit of Collins (Manager of the firm's Commodity Department) avers (R. 7–8) that the customers requested the transfer. The supplemental affidavit of Collins avers that this request followed the firm's request that the account be transferred (R. 9–10).

On that day, petitioners carried out these instructions. They recorded sales of future contracts for 24,100 bales to Fenner & Beane, who also recorded a purchase of a like amount from petitioners, on the ordinary forms supplied by the New York Cotton Exchange Clearing Association (R. 2–3, 15). The transaction was cleared through the Clearing Association (R. 8, 9). No commission was charged the customers (R. 8).

On March 23, 1934, petitioners made oral request of the Clearing Association to exempt the transaction from the tax, on the ground that it represented a change of brokers rather than an actual sale. The request was denied because there was no such precedent under the customary usage of the Clearing Association. (R. 16.) On April 4, 1934, petitioners filed a "monthly stamp tax memorandum" with the Clearing Association, to which were affixed revenue stamps, including those in the amount of $729.40 which represented the transaction now in question (R. 3, 15–16).

On April 5, 1934, a claim for refund of this tax was filed. It was rejected on June 12, 1934 (R. 3–4). This suit was filed to recover $729.40 in taxes paid. Petitioners moved, on the pleadings and affidavits, for summary judgment (R. 6). Respondent filed a cross-motion for summary judgment, annexing additional affidavits (R. 12). The District Court entered judgment dismissing the complaint (R. 26). The Court of Appeals for the Second Circuit affirmed on appeal (R. 34).

SUMMARY OF ARGUMENT

I

The tax provided by Section 800, Sched. A–4, is imposed on the privilege of using the sales mechanism of a commodities exchange and the business purposes of the parties are immaterial. *Nicol* v. *Ames,* 173 U. S. 509.

II

It is equally clear that this transaction was an actual sale. The petitioners in their transactions with the other brokers and with the Clearing House acted as principals. *Clews* v. *Jamieson,* 182 U. S. 461. As such, they were under a duty not only to make delivery of the cotton to their customer but also to make payment to the Clearing House for this cotton. This last liability could not be released except by an actual sale to the substituted brokers.

The transaction is unrelated to the "scratch sale" which is exempted from taxation by Section 800, Sched. A–4, and, in any event, is clearly not within the definition prescribed by the Treasury Regulations. *United States* v. *Uhlmann Grain Co.*, 84 F. (2d) 901 (C. C. A. 7th) was based on a principle which offers some support to the petitioners but was erroneously decided and also involved important considerations not present in this case.

III

The tax in question has for 26 years been construed by the administrative officials, without recorded protests by taxpayers, and with the acquiescence of the Clearing Association, to include transactions of this nature. This administrative and practical history forecloses attack at this date. *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315; *Brewster* v. *Gage,* 280 U. S. 327, 336. In addition, the Treasury Regulations, in force for 17 years, clearly exclude this transaction from the exempt classifications. In view of the many reenactments of the Revenue Acts, without change of the taxing section, these regulations have the force of law. *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 294.

ARGUMENT

I

THE BUSINESS PURPOSES OF THE PARTIES ARE IMMATERIAL TO THE TAXABLE CHARACTER OF THIS TRANSACTION

The District Court found it unnecessary to consider[2] what was the substance of this transaction, because it viewed the tax liability under Section 800

[2] The court was of opinion that "actually there was no sale, for the customer was the owner of the cotton before and after the transaction" (R. 25). As is demonstrated below, this is a quite erroneous view of the transaction.

of the 1926 Act as controlled by form (R. 25). The decision, at least as the principle is applied in this case, seems clearly correct.

This Court considered the nature of this tax (under Section 6, Sched. A, of the Act of June 13, 1898, 30 Stat. 448, 458) in *Nicol* v. *Ames,* 173 U. S. 509. It said (p. 519):

> We think the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself.

Since the tax is not laid upon the *business* of selling cotton futures but upon the *privilege of using the sale mechanism of the exchange,* it is wholly immaterial to tax liability whether or not this sale mechanism as used reflects a business sale. If the exchange facilities for the sale of cotton futures were used, the transaction includes every element upon which the tax is predicated. Petitioners, in asking that a further inquiry be made into the underlying substance of the transaction, wholly disregard the nature of this tax.

It is unnecessary to go as far as the District Court decision, or to consider whether the rule of *United States* v. *Isham,* 17 Wall. 496, 506–507, that

substance must be disregarded for form,[3] need be applied here. For the "substance" of this transaction is not the business purposes of the parties but solely their use of the sale mechanism of the exchange.

II

THIS TRANSACTION WAS A SALE OF COTTON FUTURES IN SUBSTANCE AS IN FORM

The Government believes that the taxable character of this transaction is established by the undisputed fact that it involved the use of the sale mechanism of the Exchange. However, it seems equally clear that the transaction was, in actual fact and in legal effect, a sale of cotton futures. The court below based its decision upon this ground (R. 32–34).

Petitioners' argument (Br. 4–6) that the transaction was not a "real sale", but merely the transfer of a brokerage account to another agent cannot properly be evaluated unless the nature of the transactions on the New York Cotton Exchange be analyzed in some detail.

Abney directed petitioners to purchase future contracts calling for May delivery of 24,000 bales of cotton.[4] Petitioners went upon the floor of the

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[3] See *Goodyear Co.* v. *United States*, 273 U. S. 100, 103, limiting this rule to a documentary stamp tax, and compare the approach of this Court in *Provost* v. *United States*, 269 U. S. 443.

[4] For purposes of simplicity, it will be assumed that Abney purchased 24,000 bales of cotton futures at the same time,

Exchange and purchased these contracts from another member, who was, it may be assumed, acting for a customer who wished to sell. The selling broker signed and delivered to petitioners a contract, or "slip", agreeing to deliver 24,000 bales of cotton to petitioners in May, at 11.87 cents per pound. Petitioners in turn signed and delivered to the selling broker a slip recording that they had purchased 24,000 bales of cotton for May delivery at 11.87 cents per pound. (New York Cotton Exchange, By-Laws, Sec. 34; R. 20–21.) At this stage, then, the legal relationships consisted of: (1) an obligation of an unknown seller to deliver 24,000 bales to the selling broker in May;[5] (2) the obligation of the selling broker (a) to deliver 24,000 bales to petitioners in May, and (b) at that time, or possibly at once, to pay the unknown seller approximately $1,500,000; and (3) the obligation of petitioners (a) to pay $1,500,000 to the selling broker when delivery is made to him in May, and (b) to deliver 24,000 bales to Abney in May.

At the close of the day's business, the transactions of petitioners and of the selling broker were cleared through the Clearing House. The clearing is accomplished by purchases by and sales to the Clearing House. If, on this day, petitioners had

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and that they all called for May delivery at 11.87 cents. Compare R. 23.

[5] This obligation was probably cancelled by an earlier obligation of the selling broker to deliver the 24,000 bales to the customer.

engaged in no other transaction, their records sent to the Clearing House would show 24,000 bales purchased. The Clearing House would accordingly agree to sell 24,000 bales to petitioners; this obligation would be covered by a converse obligation from other brokers.[6] New York Cotton Exchange Clearing Association, By-Laws, Sec. 11 (R. 22–23); *Hubbard,* Cotton and the Cotton Market, p. 266, 270; *Hoffman,* Future Trading, p. 202 et seq. Petitioners' status would then consist of a duty to pay the Clearing House $1,500,000[7] when delivery was made by the Clearing House in May, a right to receive from the Clearing House 24,000 bales of cotton in May, and a duty to deliver 24,000 bales of cotton to Abney in May.[8]

At this juncture, Abney requested that the account be transferred to Fenner & Beane. The transaction by which this was accomplished took

[6] Unless the Clearing House were arbitrarily to choose the selling broker or brokers who should assume the duty to make delivery to the brokers whose transactions showed a net purchase, there is no other device by which the transactions could completely and expeditiously be cleared.

[7] This figure is retained without allowance for "marking the contracts"; i. e. for payments to or by the Clearing House representing the difference between the price at which the transaction was made and that at which the market closed. (Clearing Association, By-Laws, Sec. 11; R. 22–23.)

[8] In this discussion no account will be taken of the margin arrangements between the customer, the broker and the Clearing House. They do not change the legal analysis in any particular. For a full description of the margin arrangements, see *Hoffman, supra,* pp. 205–210; *Garside,* Cotton Goes to Market, pp. 141–142.

place as follows: (1) Abney, whose request to transfer the account was made in the light of the Exchange rules (New York Cotton Exchange, Rule 1; cf. R. 8; *Bibb* v. *Allen,* 149 U. S. 481, 489–490), in effect asked petitioners to sell at the price of 11.87 and Fenner & Beane to buy at 11.87. Abney accordingly promised May delivery of 24,000 bales to petitioners, thus off-setting petitioners' earlier obligation to deliver this amount to him in May. Petitioners in return promised to pay $1,500,000 to Abney, as the sale price of this cotton, thus off-setting Abney's earlier promise to pay this amount to petitioners. Accordingly, all obligations between Abney and the petitioners were eliminated. (2) The transaction between the brokers consisted of a sale of 24,000 bales, for May delivery, to Fenner & Beane. Petitioners agreed to deliver 24,000 bales, at 11.87 cents, to Fenner & Beane in May, and Fenner & Beane agreed to pay petitioners $1,500,000 at that time. (3) In the clearing transaction, these duties were assumed by the Clearing House. It promised May delivery of the 24,000 bales to Fenner & Beane, who promised to pay the Clearing House $1,500,000 at that time. (4) Petitioners as a result of this transaction (a) were under obligation to deliver 24,000 bales to the Clearing House in May, and (b) had a right at that time to receive $1,500,000 from the Clearing House. These rights and duties were exactly off-set by the earlier obligations, arising from the

original purchase for Abney, (a) of petitioners to pay the Clearing House $1,500,000 on delivery, and (b) of the Clearing House to deliver 24,000 bales to petitioners in May.

In result, petitioners were entirely released of all rights and duties in connection with the Abney account, and their place was taken by Fenner & Beane who were obligated to make the payment to the Clearing House and to make delivery of the cotton to Abney. The transaction was not a mere formality. It resulted in releasing petitioners of their obligations: (1) to deliver 24,000 bales of cotton to Abney in May, and (2) to pay the Clearing House $1,500,000 when the cotton was delivered to petitioners. Had the transaction been merely the substitution of one agent for another, it would have had the first consequence but could not have released petitioners of their obligation to pay the Clearing House. This was an obligation assumed by petitioners as principals and could be performed only by (1) making payment or (2) obtaining an off-setting obligation from the Clearing House. The latter alternative was achieved by *selling* the cotton futures to Fenner & Beane (and thus to the Clearing House); it could not otherwise have been accomplished.[9]

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[9] Section 7 of the Commission Law Rules of the New York Cotton Exchange (R. 22) recognizes that this transaction constitutes a sale. It requires that full commission be charged "for both *buying and selling*" if the transfer is at the request of the customer.

The basic error of petitioners consists of their insistence that they were mere agents, with the status of a broker acting for a disclosed principal (Br. 4–6). It is abundantly plain that this is not the case, and that, in their transactions with other brokers and with the Clearing House, petitioners acted only as principals. New York Cotton Exchange, By-Laws, Sec. 34 (R. 20); New York Cotton Exchange Clearing Association, By-Laws, Sec. 11 (R. 22–23); *Mullinix* v. *Hubbard*, 6 F. (2d) 109, 110 (C. C. A. 8th); *American Cotton Mills* v. *Monier*, 61 F. (2d) 852, 854 (C. C. A. 4th); *Hutton* v. *Terrill*, 255 Fed. 860, 862 (S. D., N. Y.); *Jemison* v. *C. S. Bank*, 122 N. Y. 135, 142; cf. *Clews* v. *Jamieson*, 182 U. S. 461, 482–483; *Wilhite* v. *Houston*, 200 Fed. 390, 392 (C. C. A. 8th); *Garside*, Cotton Goes to Market, p. 138; *Hoffman*, *supra*, pp. 168, 185–186. Having acted as principals, petitioners had incurred liabilities which could not be released if the account were attempted to be transferred by means of a mere transfer of the agents' duties from petitioners to Fenner & Beane. The obligation to pay the Clearing House $1,500,000 could be released only by means of a sale to Fenner & Beane, and thus to the Clearing House.[10] Thus, the sale was not a mere formality but an actual transaction which was indispensable if the parties' purpose were to be accomplished.

[10] Section 800, Sched. 4–A, *infra*, provides that transfers to a clearing-house shall not be taxed, "provided that such transfer shall not vest any beneficial interest in such clear-

In *Provost* v. *United States,* 269 U. S. 443, this Court held that the so-called "loan" of stock, to permit delivery after a short sale, was a "sale" of shares of corporate stock and taxable under Title VIII, Sched. A–4, of the Revenue Act of 1917 (c. 63, 40 Stat. 300, 322). Its statement (p. 454), in regard to the argument that the transaction was essentially the pledge of stock, is equally applicable to petitioners' contentions that this transaction was a mere substitution of agents: "These arguments ignore the essential legal characteristics of the * * * transaction."

Petitioners argue that the transaction was equivalent to a "scratch" or "transferred" sale and that the statutory exemption from taxation of the scratch sale should result in the exemption of this transaction (Br. 12–13). This contention is based upon an erroneous analysis of the nature of the scratch sale and a mistaken view of the reasons which led Congress to exempt this transaction.

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ing-house association but shall be made for the sole purpose of enabling such clearing-house association to adjust and balance the accounts of the members * * *." Congress cannot be supposed by this language to have intended that the rights and duties of the Clearing Association should be treated as merely formal and without substantial content. Since the sales to and by the Clearing House would fail of their purpose unless they invoked all the legal consequences of sale, the qualification as to vesting no beneficial interest must be taken to mean only the requirement that each purchase or sale be off-set by a corresponding sale or purchase to the other broker.

1. The scratch or transferred sale is one which involves a virtually simultaneous off-setting purchase and sale at the same price. It occurs in two situations: (a) The first arises when a broker, in order to fill the exact amount of an order, buys a larger amount and sells to a third broker whose order, combined with that of the original broker, exactly equals the only available offer. For example, broker A may have an order to buy 3,000 bales. Broker B is offering to sell 5,000 bales. Broker A notices that broker C is bidding for 2,000 bales. A therefore buys 5,000 bales from B and, at the same price, sells 2,000 bales to C. He then asks B to deliver to C, and C to accept delivery from B. If they agree, A's name, as to the 2,000 bales, is scratched off the records of B and C which therefore show a sale of 2,000 bales by B to C. (b) The second situation arises from "scalping" transactions which show no profit. The scalper is a trading member of the Exchange who seeks his profit in fractional movements, and necessarily buys and sells with great rapidity. It may often chance that he will buy, say, 1,000 bales and, for one reason or another, will sell it shortly afterward for exactly the price which he paid for it. In such a situation, he will customarily ask the seller to deliver to the subsequent buyer and, if they agree, his name is scratched out of the two transactions. See testimony of James H. Winston, House Committee on Ways and Means, Hearings on Revenue Act of 1918, II, pp. 1214, 1216, 1222.

Prior to the scratching out of the intermediary broker, in either of these transactions, he was liable both to his seller and to his buyer. Accordingly, the transaction would, if it remained in that status, be subject to the tax. But, in consenting to the scratch-out, the other two parties release him from all obligations running to either of them. The net result is that his momentary rights and liabilities have entirely vanished and there remains no change in position upon which to predicate the tax. Such is not the case in the transaction now in question, where the sale of the 24,000 bales resulted in petitioner's release from its obligations (a) to pay the Clearing House, say, $1,500,000 and (b) to deliver 24,000 bales to Abney.

It should be noted that the scratch sale is not reported to or cleared through the Clearing House. (Hearings on Revenue Act of 1918, *supra*, at p. 1215.) This recognition by the Exchange of the absence of any transaction sufficient to change the status of the intermediary broker is to be contrasted with the necessity that the sale by which an account is transferred be cleared through the Clearing House.

2. The exemption given scratch or transfer sales first appeared in Section 1107, Sched. A–5, of the Revenue Act of 1918, c. 18, 40 Stat. 1057. The committee reports [11] contain no explanation of this

[11] H. Rept. No. 767, p. 57; S. Rept. No. 617, p. 18; 65th Cong., 2d Sess.; H. Rept. No. 1037, 65th Cong., 3d Sess.

amendment, but the hearings before the Ways and Means Committee make quite plain that the exemption was granted as a matter of policy, to prevent driving the scalper out of business, as was threatened under the provisions of the 1917 Act (sec. 807, Sched. A–5, c. 63, 40 Stat. 300) which expressly subjected the scratch sale to tax. See the testimony of Winston and the colloquy with committee members, Hearings on Revenue Act of 1918, *supra,* pp. 1212–1223. No such consideration is applicable to the transaction in question.

3. Finally, Articles 44 (a) and 125 (3) (c) of Treasury Regulations 71, *infra,* require, among other things, (a) that the purchase and sale be made on the same day if the scratch sale exemption is to apply, and (b) that the intermediary broker instruct the broker who sold to him to deliver to the broker who bought from the intermediary broker. It is apparent that, even apart from the Regulations, both of these requirements are essential if the transaction is to be a true scratch sale. The transaction now in question meets neither requirement. Articles 44 (a) and 125 (3) (c) are identical with Articles 23 (a) and 33 (3) (c) of Regulations 40, adopted under the 1918 Act. The many reenactments of the taxing section, without relevant change, give the regulations the force of law. *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 294; *Hartley* v. *Commissioner,* 295 U. S. 216, 220.

Petitioners also stress the fact that this transaction did not take place under open bidding on the

Exchange but was arranged by the brokers at the price originally paid by petitioners (Br. 5). But Schedule A–4 of Section 800, in providing that the tax applies to "each sale, agreement of sale, or agreement to sell * * * at, *or under the rules or usages of,* any exchange," expressly includes this situation. Section 7 of the Commission Law Rules of the New York Cotton Exchange (R. 22) governs the sales by which an account is transferred,[12] and thus makes plain that the transaction occurred "under the rules or usages" of the Exchange.

As the court below pointed out (R. 33), the opinions of the witnesses, set forth in petitioners' affidavits, that these transactions were not actual sales (R. 8, 9, 10, 11–12) are mere opinions as to a question of law and are to be given no weight.

The Government can see no support for petitioners' position except that which they derive from *United States* v. *Uhlmann Grain Co.*, 84 F. (2d) 901 (C. C. A. 7th). The case involved taxes imposed, under the section now in question, on a wheat

[12] So far as petitioner's argument (Br. 5) may be based on the failure to charge commissions (R. 8) it should be noted that Section 7 of the Commission Law Rules (R. 22) provides that a commission *must* be charged when the account is transferred at the request of the customer. Since the transaction is precisely the same, irrespective of which party requests the transfer, it is immaterial whether commissions should or should not have been charged in this case. See footnote 1, *supra*, p. 2.

transaction on the Chicago Board of Trade. Under the rules of the clearing house of that exchange, members must post collateral to guarantee performance of contracts under which they undertake to make future delivery; that is, they must post margin for short sales. The margin requirement increases progressively, so the custom has grown up of making "accommodation trades" or "position loans." [13] The member with an excessive short interest delivers his contracts to one whose position is such that he can absorb the additional short interest under lower margin requirements than is required of the transferor. Although the transactions are recorded on different forms than ordinary sales and are not required to be executed in the pit, they appear on the records of the clearing house as ordinary sales. The Court of Appeals held that these "accommodation trades" were not sales, or agreements of sale or to sell under Section 800, Sched. A–4, of the 1926 Act.

The decision is incorrect and, in any event, is not applicable here.

1. The "accommodation trade" would be useless unless it were a genuine sale, passing full legal title. For the Exchange to release the transferor from

[13] By Section 4 (c) of the Commodity Exchange Act of June 15, 1936 (c. 545, 49 Stat. 1491, Pub., No. 675, 74th Cong., 2d Sess.), "accommodation trades" are prohibited.

his margin requirements, it is necessary that he be under no obligation to make delivery of the wheat. This may be accomplished only if the trader who loans his position assumes, in the place of the one who is accommodated, the full duty to make the agreed delivery. This result, under the clearing house mechanism (similar to that of the New York Cotton Exchange), can be obtained only if the trader who loans his position in effect sells to the trader who is accommodated and so, after clearing, is under obligation to the clearing house to make delivery of the wheat; the other party, by purchase of the wheat, has obtained an off-setting duty on the part of the clearing house to make delivery, thus reducing his net position.

It is immaterial that, by private arrangement between the parties, the trader who is accommodated agrees to sell to the other, at the same price, before delivery need actually be made. The transaction carries all the consequences of a sale and, under clearing house rules, has resulted in vendor and vendee rights and duties between the clearing house and the traders. These rights and duties are wholly unaffected by the repurchase agreement of the parties, and serve to make untenable any contention that the transaction amounts merely to something analogous to a loan or pledge.

The decision in the *Uhlmann* case cannot be reconciled with *Provost* v. *United States*, 269 U. S.

443. There, under the analogous corporate transfer tax, this Court held that a so-called "loan" of stock to enable a short seller to make delivery was a sale and subject to tax. The Court emphasized that the transaction had the legal consequences of a sale and rejected the argument that, in practice, the transaction was subsequently off-set by a "return" of the borrowed stock.[14]

2. Even if it were correctly decided, the *Uhlmann* case is inapplicable to a transaction such as that now in question. The court in that case relied chiefly on the consideration that neither trader intended that the one who "loaned his position" should have to fulfill any of the obligations resulting from the transaction. This element is wholly lacking from the present case. The very purpose of the transaction was that petitioners should be released of their obligations and that Fenner & Beane should assume an equivalent duty to Abney and to the Clearing Association.

In summary, the transaction on the New York Cotton Exchange by which an account is transferred from one broker to another is a sale not only in form but also in substance. Every legal conse-

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[14] The Circuit Court of Appeals for the Seventh Circuit stressed that in the accommodation trade the *same* agreement of sale was returned to the trader who was accommodated. This detail is immaterial and cannot serve to convert into a mere pledge a transaction which has all the legal consequences of a sale.

quence of a sale attaches to this transaction. Petitioners' argument that it represents merely the substitution of one agent for another completely disregards the fact that, as between themselves and the Clearing House, the cotton brokers acted as principals. The argument thus seeks to pursuade this Court that both the form and the substance of the transaction should be ignored in order to obtain conformity with a misleading characterization of the transaction.

III

THE LONG-CONTINUED ADMINISTRATIVE AND PRACTICAL CONSTRUCTION OF THE ACT COMPELS AFFIRMANCE OF THE COURT BELOW

The stamp tax upon commodity futures dates back to the Act of June 13, 1898 (sec. 6, Sched. A, c. 448, 30 Stat. 448, 458), which was repealed by the Act of April 12, 1902 (sec. 7, c. 500, 32 Stat. 96, 97). It was reenacted by the Act of October 22, 1914 (sec. 22, Sched. A, c. 331, 38 Stat. 745) and has continued in force since that date. There have, accordingly, been 26 years of administrative and practical construction of this tax.

The Treasury Department has consistently applied the tax to transactions by which an account is transferred to another broker. The Clearing Association of the New York Cotton Exchange has viewed the transaction as taxable; the Secretary

and Treasurer of the Clearing Association stated that "there was no precedent under the customary usages of the Clearing Association" to grant tax-exemption of these transactions (R. 16). This administrative and practical construction, extending over a quarter of a century, should of itself be sufficient to preclude petitioners' contentions. *United States* v. *Moore,* 95 U. S. 760, 763; *Logan* v. *Davis,* 233 U. S. 613, 627; *Brewster* v. *Gage,* 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States,* 282 U. S. 375; *Interstate Commerce Commission* v. *N. Y., N. H. & H. R. Co.,* 287 U. S. 178; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315.

In addition, Treasury Regulations have been in effect since the 1918 Act which, in defining the exemptions from the tax, make plain that transactions such as this are not exempt. Regulations 40, Arts. 23 (a), 33 (3) (c); Regulations 71, Arts. 44 (a), 125 (3) (c). There have been many reenactments of the revenue acts since the promulgation of Regulations 40, and the failure to change the section imports Congressional approval of the regulation, *Brewster* v. *Gage,* 280 U. S. 327, 337; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *Murphy Oil Co.* v. *Burnet,* 287 U. S. 299, 307, sufficient to give it the force of law, *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 294; *Hartley* v. *Commissioner,* 295 U. S. 216, 220.

CONCLUSION

For the reasons which have been set forth, we respectfully submit that the judgment of the court below should be affirmed.

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DECEMBER, 1936.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax. (U. S. C., Title 26, Sec. 900.)

SCHEDULE A.—STAMP TAXES

* * * * *

4. Produce, sales of, on exchange: Upon each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales), any products or merchandise at, or under the rules or usages of, any exchange, or board of trade, or other similar place, for future delivery, for each $100 in value of the merchandise covered by said

sale or agreement of sale or agreement to sell, 1 cent, and for each additional $100 or fractional part thereof in excess of $100, 1 cent: *Provided*, That on every sale or agreement of sale or agreement to sell as aforesaid there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement, or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be affixed a lawful stamp or stamps in value equal to the amount of the tax on such sale: *Provided further*, That sellers of commodities described herein, having paid the tax provided by this subdivision, may transfer such contracts to a clearing-house corporation or association, and such transfer shall not be deemed to be a sale, or agreement of sale, or an agreement to sell within the provisions of this Act, provided that such transfer shall not vest any beneficial interest in such clearing-house association but shall be made for the sole purpose of enabling such clearing-house association to adjust and balance the accounts of the members of such clearing-house association on their several contracts. Every such bill, memorandum, or other evidence of sale or agreement to sell shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers; and any person liable to pay the tax as herein provided, or anyone who acts in the matter as agent or broker for such person, who makes any such sale or agreement of sale, or agreement to sell, or who, in pursuance of any such sale, agreement of sale, or agreement to sell, delivers any such products or merchandise without a bill, memorandum, or other evidence thereof as herein required, or who delivers such bill, memo-

randum, or other evidence of sale, or agreement to sell, without having the proper stamps affixed thereto, with intent to evade the foregoing provisions, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not exceeding $1,000 or be imprisoned not more than six months, or both.

No bill, memorandum, agreement, or other evidence of such sale, or agreement of sale, or agreement to sell, in case of cash sales of products or merchandise for immediate or prompt delivery which in good faith are actually intended to be delivered shall be subject to this tax.

This subdivision shall not affect but shall be in addition to the provisions of the "United States cotton futures Act," approved August 11, 1916, as amended, and "The Future Trading Act," approved August 24, 1921. (U. S. C., Title 26, Sec. 902.)

Treasury Regulations 71, approved July 16, 1932, promulgated under the Revenue Act of 1926:

ART. 44. *Transactions not subject to tax.*—

(a) So-called "transfer or scratch sales" or "pass-outs" are not subject to the tax: *Provided,* That the purchase and sale are made at the same exchange, on the same day, at the same price, and for the account of the same person.

* * * * *

ART. 125.

* * * * *

(3) As used in Chapter IV of these regulations—

* * * * *

(c) The term "transferred or scratch sale" includes "pass-outs" or those transac-

tions in which a person buys from another a certain quantity of any product at a certain price, and at the same session of an exchange, sells to a third person the same quantity of the same product at the same price, and eliminates himself by instructing the person from whom he bought to deliver such product to the person to whom he sold; but no transaction in which a broker or a commission member of an exchange receives a commission greater than that charged to a person who executes his own contracts shall be deemed to be a "transfer" or a "scratch sale";

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1936

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 332.—October Term, 1936.

Francis I. Dupont, et al., Petitioners, *vs.* The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 1, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

Section 800, Schedule A (4) of the Revenue Act, 1926,[1] imposes a stamp tax upon "each sale, agreement of sale, or agreement to sell (not including so-called transferred or scratch sales) . . . at, or under the rules or usages of, any exchange . . . for future delivery." Whether the tax is payable upon a broker's transfer of a customer's account in cotton futures to another broker through the cotton exchange is the matter in controversy. The Circuit Court of Appeals has held the transaction taxable.[2] A conflict of decision moved us to grant certiorari.[3]

Petitioners are members of a partnership trading on the New York Cotton Exchange. On behalf of a customer they purchased cotton for future delivery. They were instructed by the customer to transfer the account to other brokers. To accomplish this petitioners delivered a "sold" memorandum to the transferee of the account, who, in turn, delivered a "bought" memorandum to the petitioners. No commission was charged because the instructions to transfer had been given at petitioners' request, as they desired to be relieved of the account. In order to record such a transfer with the exchange the custom was to use bought and sold memoranda in the form invariably employed by members of the exchange in purchase and sale of cotton for future delivery. The petitioners affixed to the sold memorandum stamps in the proper amount and after denial of a refund, brought action for the amount of the tax.

[1] 26 U. S. C. 903.

[2] 83 F. (2d) 951.

[3] See *United States* v. *Uhlmann Grain Co.*, 84 F. (2d) 901.

The petitioners contend that no sale, agreement of sale or agreement to sell was in fact made, though for convenience, and because of lack of other medium to evidence the transfer, papers in form agreements of sale were employed. The government insists that the tax is essentially upon the privilege of using the facilities of an exchange and petitioners here exercised this privilege and a sale was in fact made. We hold the tax was lawfully imposed and the petitioners are not entitled to recover the value of the stamps.

1. The transaction was not a "scratch" or "transferred" sale within the meaning of the exemption found in the section. A scratch or transferred sale is one in which there is an offsetting purchase and sale at the same price on the same day. Where a broker, in order to fill a customer's order, buys a larger amount and sells the excess to a third broker, directing the selling broker to deliver the excess to the broker who has purchased it, and directing the broker who purchases the excess to take delivery from the selling broker, the name of the intermediate broker is erased from the records of the exchange so that the sale of the excess appears as a sale direct from the one to the other of the two remaining brokers. The exemption also covers trading by a scalping broker who makes his profit in fractional movements on the exchange, buying and selling with great rapidity, thus often purchasing and selling the same amount of the commodity at the same price within a few moments or hours. By agreement amongst the members his name is scratched out of the records of the exchange and his temporary rights and liabilities do not appear upon its records. Accordingly, the Treasury Regulations in force since 1918 require that purchase and sale be consummated on the same day if the exemption is to apply and that the intermediate broker instruct the broker who sold to him to deliver to the other who bought from him.[4]

2. The tax is not upon the business transacted but is an excise upon the privilege, opportunity, or facility offered at exchanges for the transaction of the business. It is an excise upon the facilities used in the transaction of the business separate and apart from the business itself.[5] In this view it is immaterial

[4] Treasury Regulations 40 under R. A. 1918, Articles 23 (a) and 33 (3) (c). Treasury Regulations 71, Articles 44 (a) and 125 (3) (c).

[5] *Nicol* v. *Ames*, 173 U. S. 509, 519, 523.

whether the transfer of the account constituted a sale. Unquestionably the petitioners used the facilities of the exchange for offsetting their obligation as a purchasing broker by arranging that another broker should take over that obligation under the rules of the exchange. Such a transaction comes within the intent of the statute and renders petitioners liable for the tax.

3. Under the rules and practice of the Cotton Exchange the transaction taxed was an actual sale. The fact that the sale was made for the purpose of transferring a brokerage account is irrelevant. When the petitioners purchased on the exchange the future contracts for their customer the selling broker handed the petitioners a memorandum agreeing to deliver at the date and price therein specified and the petitioners gave the selling broker a similar purchase memorandum. This each was required to do by the by-laws of the exchange. As a result of the operations of the clearing house the petitioners would, at the close of the day's business, be under obligation to pay the clearing house upon delivery being made at the future date and they would have a correlative right to receive from the clearing house the cotton purchased. Although the broker who made the sale to the petitioners would have a right to receive from his principal the necessary cotton to make delivery according to the sale, and although the petitioners who had bought the cotton would be under an obligation to their customer to deliver to him, both brokers were, under the by-laws of the exchange, principals in the transaction. When, therefore, the customer ordered the transfer of the account the petitioners could only effect this by selling the futures to the substituted broker who, in turn, became obligated, so far as the exchange was concerned, as principal, to accept delivery of the cotton according to his purchase from the petitioners. The obligation assumed by the petitioners when they entered into purchase contracts could be satisfied by making payment to the clearing house or offset by selling to another broker and so obtaining that broker's contract to take delivery of the cotton from the clearing house. In no other way could the petitioners relieve themselves of that obligation.

The judgment is

Affirmed.